No. 76-726

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

EMPIRE GAS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-29a) is reported at 537 F.2d 296. The opinion of the district court (App. B, *infra*, pp. 30a-58a) is reported at 393 F. Supp. 903.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 59a) was entered on May 28, 1976. A

timely petition for rehearing and suggestion of rehearing *en banc* was denied on June 30, 1976 (App. D, *infra*, p. 60a). On September 17, 1976, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including November 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In this government civil antitrust case, the court of appeals concluded that respondent had engaged in coercive efforts to control its competitors' prices and had a specific intent to monopolize. The question presented is whether an "attempt to monopolize" requires, in addition, independent proof of a dangerous probability that monopolization will be attained.

STATUTE INVOLVED

At the time the complaint was filed in this case, Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2, provided: [1]

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[1] Section 2 was amended on December 21, 1974, to provide that a violation is a felony, punishable by maximum fines of $1 million for corporations and $100,000 for individuals, and by imprisonment for three years. Pub. L. 93-528, 88 Stat. 1708, 15 U.S.C. (Supp. V) 2.

STATEMENT

Liquefied petroleum ("LP") gas is a clean-burning fuel used primarily in areas that lack access to a natural gas pipeline. LP gas is stored in a central facility and delivered to consumers by truck. The costs associated with this method of delivery limit retailing, for most purposes, to consumers within 20 to 30 miles of the seller's bulk storage facility (App. A, *infra*, p. 2a).

Most retailers of LP gas are small businesses. Respondent is an exception. It was incorporated in 1963 and has expanded rapidly, primarily by acquiring other LP gas retailers.[2] By 1973 respondent operated in 25 States, with annual revenues of $45 million and profits of $7.5 million.

In this civil antitrust action the government introduced proof in the non-jury trial that respondent coerced its competitors to raise their prices or refrain from selling to particular customers.[3] This

[2] By 1973 respondent had acquired 81 LP gas retailers with almost 400 bulk plants (App. A, *infra*, p. 2a).

[3] Respondent also was indicted for the crimes of attempt to monopolize and of aiding and abetting the possession of an illegally made and unregistered firearm, in violation of 15 U.S.C. 2 and 26 U.S.C. 5861(c) and (d). These charges grew out of related incidents. Respondent was acquitted of

evidence is summarized by the court of appeals (App. A, *infra*, pp. 3a-13a). Respondent told competitors to adopt specific (higher) prices and that, if they would not do so, respondent would decrease its own prices. Respondent carried out this threat on several occasions, and some competitors responded by raising their prices or ceasing to solicit Empire's customers. On one occasion respondent sent a truck bearing a competitor's name into the competitor's marketing area, falsely informing the competitor's customers that respondent had purchased the competitor's business and offering to sell gas at a reduced price.[4]

The district court entered judgment for respondent. It held that the government had not established that respondent "possessed a specific intent to achieve a monopoly" (App. B, *infra*, p. 35a), that retail distribution of LP gas is not a relevant product market (*id.* at 34a), that the distribution areas within which respondent solicited customers are not relevant geographic markets (*id.* at 34a-35a), and that the government had not established that respondent "at any time had a dangerous probability of success in achieving a monopoly" (*id.* at 35a).[5]

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the firearm charges in February 1973; the criminal Sherman Act charges were dismissed by the prosecution in April 1973.

[4] Respondent also purchased the supplier of at least one competitor and thereafter increased the wholesale price of gas to the competitor (App. A, *infra*, pp. 6a-7a).

[5] The district court also ruled in respondent's favor on charges that respondent had violated Section 1 of the Sherman

The court of appeals held that the district court's findings concerning specific intent and product market are clearly erroneous. It wrote that "an attempt to control price, competition or both demonstrates specific intent to monopolize" (*id.* at 13a). Because there was uncontradicted evidence that respondent had attempted to influence its competitors' price decisions, the court concluded, specific intent to monopolize had been established. The court concluded that LP gas is a relevant product market because it has peculiar qualities that make it especially attractive for certain uses (*id.* at 14a-17a). The court of appeals also accepted for purposes of its decision the government's argument that two of respondent's marketing areas are relevant geographic markets (*id.* at 19a-20a).

The court of appeals nevertheless affirmed. Adhering to *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269 (C.A. 8), certiorari denied, 414 U.S. 1022, 1032, it held that the plaintiff in an "attempt to monopolize" case must demonstrate that the acts of the defendant produced a "dangerous probability" of successful monopolization. The court concluded (App. A, *infra*, p. 25a) "that the district court was not clearly erroneous when it found that the government failed to prove dangerous probability of success in [respondent's] attempt to control competition or its attempt to raise prices by price intimidation."

Act, 15 U.S.C. 1. We do not present in this petition any issue concerning the Section 1 charges.

The government sought rehearing *en banc* and asked the court of appeals to discard the *Agrashell* rule. The court declined to consider the case *en banc*.

REASONS FOR GRANTING THE WRIT

1. The court of appeals held that respondent had a specific intent to monopolize, and that in furtherance of that illegal objective it engaged in various coercive practices: it attempted to persuade competitors to raise their prices or cease soliciting new customers, and it took retaliatory action against competitors who refused to accede to those demands. There is no legitimate business justification for any of those acts. We submit that acts designed to control prices or competition, done with a specific intent to monopolize, themselves establish an attempt to monopolize within the meaning of Section 2 of the Sherman Act without regard to whether those acts have produced some particular probability of successful monopolization.

Anticompetitive acts such as these pose a serious danger to normal competitive processes. No valid social or economic interests are furthered by condoning them. To the contrary, the basic interest reflected in the Sherman Act of fostering and ensuring competition would be furthered by a rule that enables such practices with no legitimate business justification to be stopped in their incipiency.

The question in this case therefore is of considerable importance to the administration of the antitrust laws. It is a question on which there should be

a uniform rule throughout the country. In fact, however, there is a conflict among the circuits on the question whether "dangerous probability of success" is a separate element in an attempt-to-monopolize charge that requires independent proof.

The holding of the court of appeals in this case that it is such an element (App. A, *infra*, pp. 20a-25a) conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, certiorari denied, 377 U.S. 993, which that court recently twice reaffirmed. In *Lessig* the defendant argued that "attempt to monopolize is established only if there is proof of 'dangerous probability of success, i.e., that if unchecked monopolization will result'" (327 F.2d at 474). The court "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize" (*ibid.*). It concluded that likelihood of monopolization may be "relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires * * *" (*ibid.*).

Subsequently, in *Hallmark Industry* v. *Reynolds Metals Co.*, 489 F.2d 8 (C.A. 9), certiorari denied, 417 U.S. 932, that court stated that "*Lessig* rejected the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize" (489 F.2d at 12) and reaffirmed the *Lessig* rule. It went on to observe that, in any event, a "dangerous probability of success" is established by "proof of specific intent to set prices or exclude competition

in a portion of the market without legitimate business purpose. The specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose" (*ibid.*). In *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1205 (C.A. 9), that court reiterated the *Hallmark* standard.

Thus, in the Ninth Circuit, "dangerous probability of success" is not a separate element of the offense requiring independent proof. An attempt to monopolize may include a dangerous probability of success, but the offense may be established by proof of (1) specific intent to set prices or exclude competition and (2) predatory conduct designed to accomplish this unlawful purpose and which has no legitimate business justification. Since the court of appeals in this case ruled that the government had established both specific intent to fix prices and exclude competition and predatory conduct designed to achieve that illegal objective—which, as shown below, has no legitimate business purpose—the government would have prevailed in this case under the rule the Ninth Circuit follows.

Similarly, we believe the government also would have prevailed under the rule in the Seventh Circuit, which, like the Ninth Circuit, does "not understand the 'dangerous probability' test to involve an evaluation of the actual likelihood that an attempt would have succeeded" (*Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598, certiorari denied, 405 U.S. 1066). Rather, the Seventh Circuit

looks to the defendant's capacity, its intent, and the character of its conduct.

In addition to the Eighth Circuit, at least four other circuits apparently treat "dangerous probability of success" as a separate element of the offense of attempt to monopolize that must be established by independent proof.[6] The conflict among the circuits is a live one, and the problem will continue to produce further litigation until this Court resolves it. The continued existence of the conflict is particularly serious because of the obvious importance of the prohibition against attempts to monopolize as a means of nipping anticompetitive practices in the bud before they have attained or closely approached actual monopolization.

2. The offense of monopolization proscribed by Section 2 of the Sherman Act has two elements: the possession of monopoly power and the willful acquisition or maintenance of that power by restrictive conduct. *United States* v. *Grinnell Corp.*, 384 U.S. 563. Monopoly power is the power to control prices or exclude competition. *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391. Section 2 of the

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[6] See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (C.A. 1), certiorari denied, 421 U.S. 1004; *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (C.A. 5); *Yoder Brothers, Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1368-1369 (C.A. 5); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296 (C.A. 10), certiorari denied, 425 U.S. 907.

Sherman Act also prohibits attempts to monopolize, *i.e.*, conduct designed to obtain the power to control prices or exclude competition, even when the defendant fails to attain its goal.

The court of appeals recognized that success is not an element of an attempt to monopolize (otherwise attempt to monopolize would vanish as an independent crime), but it concluded that the government must offer independent proof that the defendant had achieved a "dangerous probability" of obtaining a monopoly. The court of appeals erred in so ruling because it failed to consider the important interests that the prohibition of attempts to monopolize is designed to protect.

In *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61, this Court wrote that Congress intended Section 2 of the Sherman Act to complement the prohibitions of Section 1 in order to forbid restraints upon competition.

> [T]he second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

In order to attain this objective Section 2 must be read broadly. An attempt to monopolize should be understood as a separate offense, not merely as an activity that comes close to establishing a monopoly.

The common law of attempts was concerned with distinct crimes—robberies, murders, and the like—with single and identifiable objectives capable of precise ascertainment. It made sense, in dealing with crimes of this sort, to prohibit as attempts only those acts that go beyond mere preparations. Most preparations for crimes are harmless in themselves, and unless the law defines attempt as an act that comes uncomfortably close to succeeding, it stands in danger of penalizing malicious intent without more. See generally Holmes, *The Common Law* 65-74 (1881). But even at common law it was recognized that in some cases "intent to produce the harm complained of has an importance of its own" (Holmes, *Privilege, Malice, and Intent*, in *Collected Legal Papers* 131 (1952)). In such cases the requirement of proximity to success has been relaxed, for the intent, accompanied by some overt act, was itself sufficiently mischievous to require prohibition.

Attempt to monopolize is such a crime. The carrying out of predatory or anticompetitive acts, without business justification but with a specific intent to monopolize, may have a substantial anticompetitive effect even if the defendant never succeeds in achieving a monopoly. The attempt may induce competitors to be less competitive; it certainly increases the chance

that monopolization eventually will occur, if not very soon at least within the foreseeable future.[7]

In determining the role probability of success should play in an attempt-to-monopolize case, two situations must be distinguished. When a defendant's conduct is not obviously anticompetitive—that is, when it might promote efficiency and competition under some circumstances, restrain competition under others, or be competitively neutral in others—it is necessary to undertake a careful examination of the effect on the market conditions in which it takes place. For example, no intent to control prices or exclude competition could legitimately be inferred from a simple price reduction by a competitor, absent other evidence that it was part of a campaign to monopolize. When ambiguous conduct is the gravamen of an attempt-to-monopolize charge, the court must examine the structure of the market

[7] The standard we urge here is consistent with the modern view of criminal attempts. See A.L.I., *A Model Penal Code* § 5.01(1)(c) (tentative draft No. 10); Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 571, 573-611 (1961). Under the *Model Penal Code* an act is an attempt if the actor does "anything which, under the circumstances as he believes them to be, is a substantial step in the course of conduct planned to culminate in his commission of the crime." The draftsmen of the *Model Penal Code* thought that a requirement of a "substantial step" toward the ultimate goal would safeguard against prosecutions for *mens rea* alone, while guaranteeing that acts increasing the probability of the occurrence of the evil sought to be prevented would be illegal.

involved, the defendant's actual market power, and the likelihood of its attaining a monopoly.

On the other hand, where the defendant's conduct has no redeeming competitive virtue—that is, when the conduct never serves any purpose other than to attempt to control a competitor's prices or exclude competition—the conduct itself creates a danger of monopolization and demonstrates the actor's intent to violate the law. In such cases, there is no need for courts to engage in refined analysis to determine how close the defendant actually is to obtaining the power to control prices or exclude competition. See Turner, *The Scope of Attempt to Monopolize*, 30 *Record of N.Y.C.B.A.* 487, 500, 503-504 (1975). Such conduct is so often likely to have anticompetitive effects, and so seldom likely to have procompetitive effects, that it should be forbidden without regard to its actual effect upon competition in a particular case. Cf. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5. There is no reason to protect coercive or predatory conduct demonstrating intent to control competitors' prices or to exclude competition; the conduct is socially undesirable whether or not it creates a dangerous probability of monopolization.

Under the standard we have proposed, the court of appeals has found that respondent has engaged in the anticompetitive conduct that Section 2 was designed to outlaw. Respondent engaged in coercive conduct designed to control prices and exclude competitors. Respondent's acts are anticompetitive, so that no additional economic analysis is necessary.

3. The courts of appeals that insist upon independent proof of a "dangerous probability" rely upon *Swift & Co.* v. *United States*, 196 U.S. 375, 396, 402, for the proposition that this Court already has adopted that test. *Swift's dicta* (which concerned only whether specific intent is an element of an attempt to monopolize) do not necessarily support this view. The Court's language is ambiguous; the Court may have thought that a dangerous probability of success is a "consequence" of all acts undertaken with specific intent to monopolize.

Judge Learned Hand so read it; in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431 (C.A. 2), he wrote that "[a]lthough the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud." The standard we have articulated here will serve to nip such initial steps in the bud; the court of appeals' standard requires the United States to delay prosecution until the monopoly is almost established.

The Court's cases after *Swift* appear to look two ways. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 531-532, stated that conduct that was not an unreasonable restraint of trade under Section 1 might constitute an attempt to monopolize if done with specific intent to monopolize. The Court did not mention any requirement of proof of dangerous probability of

success. Similarly, in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 153, the Court observed that it was unnecessary to prove that a defendant had succeeded in its attempt to monopolize; it quoted the portion of *Swift* that characterized a dangerous probability of success as a consequence of specific intent to monopolize.

On the other hand, in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, a case involving the issue whether fraudulent procurement of a patent is a *per se* violation of Section 2, the Court used language that may require an analysis of actual market power in attempt-to-monopolize cases. The issue was not briefed in *Walker Process*, however. The Court's pronouncements are ambiguous precisely because it has never given the problem full scrutiny in a case in which the result turns upon its resolution. We submit that this is such a case, and that nothing in this Court's decisions to date addresses the arguments we present.

4. In formulating an "attempt-to-monopolize" standard, care must be taken to avoid sanctioning private damages actions based upon dissatisfaction with a competitor's hard competition. Such damages actions could forestall competition by making it more costly. The rule we urge, however, would not have such an effect, because it would not permit a private action to succeed unless the conduct at issue were without legitimate business justification or, if its purpose were ambiguous, it produced a dangerous likelihood of monopolization. This standard does not

create unacceptable risks of discouraging legitimate competition; to the contrary, this standard is essential in order to nip socially undesirable anticompetitive conduct in the bud before it comes too close to monopolization.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1976.

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

No. 75-1492

UNITED STATES OF AMERICA, APPELLANT

v.

EMPIRE GAS CORPORATION, APPELLEE

Submitted Jan. 12, 1976

Decided May 28, 1976

Before HEANEY, ROSS, and WEBSTER, Circuit Judges.

ROSS, Circuit Judge.

This civil antitrust action against Empire Gas Corporation was brought by the United States under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The case was tried to the court, judgment was for Empire, *United States* v. *Empire Gas Corp.*, 393 F.Supp. 903 (W.D.Mo.1975), and the government now appeals. We affirm the district court.

Empire is a retailer and to a lesser extent a wholesaler of liquefied petroleum (LP). LP is a generic term for any of various gaseous fuels such as propane and butane, which are compressed into their liquid states for marketing. Retailers generally store their LP inventories at bulk plants, from which

it is distributed by tank truck to consumers for heating, cooking and other uses. Because of the high cost of this method of transportation, a retailer's sales are usually limited in area to approximately a 30 mile radius around his bulk plant. Frequently LP retailers are small, local, family-run businesses.

Empire was founded in Missouri in 1963 and still maintains its home office in Wheaton. During the first 10 years of its life it greately expanded its business in Missouri and added bulk plants in 24 other states. This expansion was largely through acquisition of 81 other LP gas retail companies with close to 400 bulk plants.

The complaint alleged several violations of the antitrust laws,[1] but on appeal the United States has concentrated on their contentions that Empire violated section 2 of the Sherman Act by attempting to monopolize the retail sale of LP in areas surrounding Lebanon and Wheaton, Missouri, and that Empire restrained commerce in violation of section 1 by obtaining covenants not to compete from its employees and others.

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[1] Allegations of threats and attempts to destroy the business or property of competitors, price fixing, and reciprocal purchasing arrangements have been abandoned on appeal. The destruction of property allegations were the subject of an earlier criminal trial in which Empire, its president and the president of two private security firms were acquitted by a jury verdict.

I. *Attempt to Monopolize.*

In order to establish an "attempt to monopolize * * * any part of the trade or commerce among the several States * * *" under 15 U.S.C. § 2, the government was required to show Empire's specific intent to monopolize and a dangerous probability of success within a relevant product and geographic market. *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269, 284, 286 (8th Cir.), *cert. denied*, 414 U.S. 1022, 1032, 94 S.Ct. 445, 461, 38 L.Ed.2d 313, 323 (1973). The district court held that the plaintiff failed to prove any element of its case.

A. Specific Intent.

Specific intent need not be proved when it is alleged and proved that monopolization has been accomplished, *United States* v. *Griffith*, 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236, 1242 (1948), but it is an element when, as here, the charge is an attempt to monopolize. *Hiland Dairy* v. *Kroger Co.*, 402 F.2d 968, 971 (8th Cir. 1968), *cert. denied*, 395 U.S. 961, 89 S.Ct. 2096, 23 L.Ed.2d 748 (1969); *United States* v. *Alcoa*, 148 F.2d 416, 431-432 (2d Cir. 1945).

The relevant geographic areas here are the Lebanon and Wheaton market areas; however, at oral argument the United States contended that Empire's actions in other areas could support an inference of monopolistic intent in the relevant geographic areas. With this we agree. We have stressed the importance

of viewing the evidence as a whole to give the antitrust plaintiff the full benefit of his proof, rather than tightly compartmentalizing the case and wiping the slate clean after considering each piece of evidence. *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 691 (8th Cir. 1966). Evidence of similar acts not charged is admissible in criminal actions when it is probative of the defendant's intent to commit the crime for which he is under indictment, *e.g.*, *United States* v. *Calvert*, 523 F. 2d 895, 908 (8th Cir. 1975), and in a civil antitrust case where the burden of proof is less and there are fewer constitutional strictures, a more restrictive rule is not justified. *See Kansas City Star Co.* v. *United States*, 240 F.2d 643, 650-651 (8th Cir.), *cert. denied*, 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438 (1957).

To show specific intent plaintiff introduced evidenc of market allocation agreements, acquisitions of competitors and covenants not to compete, among other things. However, the greatest part of the evidence of specific intent, and that which we find persuasive, relates to pricing practices of the defendant.

The evidence establishes a pattern followed by Empire in which it attempted to use price cuts or threats thereof to influence competitors' prices or methods of competition. Empire's Vice President of Finance from 1969 to 1972 testified that around 1970 he was present at staff meetings when the company president, Robert W. Plaster, indicated that Empire's competition should be encouraged to pass increased

costs of LP supplies to the retailer on to the ultimate consumer, and sales department employees thereafter contacted Empire's competitors for this purpose.

Several of these competitors testified at trial. Exemplary of their testimony is that of W. L. Arthur, the owner of Arthur Gas and Appliances of Marshfield, Missouri. Arthur competed with Empire in the overlapping Niangua and Lebanon market areas. Mr. Rex Shaddox, one of the top officials of Empire Gas, frequently stopped in to visit with the witness or his father. During these conversations, Shaddox invariably tried to convince the Arthurs to sell their business to Empire and to set their LP prices higher.[2] At the time, Arthur was selling gas in the Lebanon-area at a lower price than Empire. In late 1965, during one of these discussions of price, Shaddox told the Arthurs that Empire was too large to compete with, and could put Arthur out of business. The following day Mr. Plaster, Empire's president, called and asked that Arthur raise his LP prices. Arthur testified that when he refused Plaster said that he

[2] Mr. Shaddox died before trial. Empire contended that testimony concerning conversations with him were inadmissible under the Missouri dead man's statute, V.A.M.S. § 491.010. This statute did not disqualify the witnesses who testified to statements of Shaddox because none of them were parties to this action. *Hunter* v. *Norton*, 412 S.W.2d 163, 165 (Mo. 1967); *Galemore* v. *Haley*, 471 S.W.2d 518, 521, 522 n. 2 (Mo.Ct.App. 1971). Since this case was governed by former Fed.R.Civ.P. 43(a), competency of the witnesses under Missouri law qualified them to testify in federal court. 5 Moore's Federal Practice 43-70-43-71 (2d ed. 1976).

was going to put him out of business. A few days later Empire began doing business in Arthur's home area of Niangua. Empire's route salesman solicited door to door with an offer of LP gas at one and a half or two cents less than Arthur was selling for. Arthur testified he could not make a sufficient profit at this price. The Empire salesman also told those he solicited that Arthur Gas was going out of business, according to the witness.

Arthur's testimony concerning Empire's retaliatory price cut was corroborated by Raymond E. Dore, Empire's treasurer from June, 1963, to September, 1967. He testified that Shaddox and Plaster were upset about the competition that Arthur was giving Empire in the Lebanon area and therefore they planned to retaliate by selling low priced LP in the Niangua area where Arthur was located. Dore was instructed by Mr. Plaster to form Niangua Gas Company for this purpose, and he did so.

Arthur testified that he and other companies in the Niangua area were affected by Empire's price cut. Finally an intermediary worked out an agreement between Empire and the other gas companies which apparently included a temporary hike in the retail price of LP.

In 1967 Empire acquired Arthur's supplier. Because of the problems which Arthur had experienced with Empire, Arthur and his son met with Shaddox to see if there was a way out of the supply contract that Arthur had with Empire's predecessor, the rights to which had been assigned to Empire. Arthur

also offered to sell his company to Empire at this time. According to Arthur, Shaddox refused to cancel the contract or buy Arthur out, and told him that "we have you right where we want you." Thereafter Empire raised the price at which it sold LP to Arthur so that he could not retail the product at a competitive price and still make a profit. Arthur also testified that Empire limited his credit to two loads of gas. This would not have been objectionable except that Empire would not mail Arthur invoices so he could pay his bills, and on this pretense they frequently refused to sell him the propane he needed. Finally, in the spring of 1967, Arthur broke his supply contract with the defendant.

Other competitors testified to similar experiences with the defendant.

Charles O. Bridges operated a company in Adrian, Missouri, beginning in 1969. In the summer of 1970 an Empire district manager and plant manager called on him and said the price of LP gas in the area was going to be either 9.5 or 15.9. At the time Bridges was buying gas wholesale at 8.7 cents a gallon, and shortly thereafter his wholesale price rose to 9.7. When Bridges pointed out that a profit could not be made at a retail price of 9.5 cents the manager told him that Empire was large enough that some subsidiaries could carry others, and that Empire was selling at 9 or 9.5 in Springfield. Shortly thereafter Empire lowered its price. Bridges testified he came as close as he could to 9.5, but eventually set his price at 15.9 cents per gallon. Gary Jennings com-

peted with Empire in the same area as Bridges, and was also contacted by the Empire district manager and plant manager in 1970. When he refused to raise his prices he was given the impression that Empire would cut their prices. At the time Jennings bought his gas from Empire at 8 or 9 cents. Shortly thereafter Empire dropped the price to its retail customers to 9 or 9.5 cents, according to Jennings' testimony. A few weeks later he raised his price.

Testimony was offered by Lloyd Geiger, who ran Gygrgas of Boonville, Missouri. In January, 1967, Mr. Shaddox called to express displeasure because Geiger was selling gas at two cents per gallon less than Empire in Jefferson City. Shaddox demanded that he come up two cents or Empire was going to play "burnout" with him. Geiger did not raise his price and two months later Empire set up a subsidiary in Boonville. The Empire company hired one of Gygrgas' employees and solicited Geiger's customers at a price of five cents per gallon.

Raymond Dore, Empire's former treasurer, testified that Mr. Plaster, Empire's president, had him incorporate the Boonville subsidiary to retaliate against Gygrgas for selling at a lower price in Jefferson City, just as the Niangua company had been organized to hurt Arthur Gas and Appliances.

Rex Smith ran companies in Springfield and Weaubleau, Missouri. In the summer of 1970 he received three visits in the space of a month from an Empire employee whom he believed to be defendant's retail price coordinator. Smith was told that Mr. Plaster

wanted the LP price in Springfield raised to 16 cents; at the time Smith's price was about 14 cents and a competitor in Ash Grove was selling at 12. Because of the Ash Grove dealer, Smith did not feel he could raise his price. During the following heating season, in February, Empire brought 15 men into the Springfield area to solicit gas at 12 cents. The witness testified that when he dropped his price to 13 cents Empire lowered its LP price to 10.7 cents per gallon the next day and offered to lease customers' tanks for nothing. At this time Smith's LP cost was 12 cents so he could not afford to go lower than a retail price of 13 or to offer free tank leases. Mr. Smith stated that Empire's 10.7 retail price continued from February until November, at which time Empire and he both went back to 14 cents.

Several other dealers testified to threats and price cuts of the defendant which were designed to make them raise prices or stop soliciting Empire customers.

The district court found that the United States had failed to show that Empire had ever threatened to reduce prices with the intent of inducing competitors to increase prices or refrain from soliciting Empire's customers, or that it ever reduced its prices for this purpose. The court also found that Empire never attempted to enter into any price fixing arrangement. The trial judge concluded that the government had not established Empire's specific intent by the evidence of pricing actions or otherwise.

We find the district court's conclusion in this regard to be clearly erroneous. The evidence of price fixing attempts, threats, and price reductions for the purpose of disciplining low price competitors and those who solicited defendant's customers was not given by one witness alone. A number of witnesses testified to the existence of some or all of these practices. Two former Empire officers corroborated competitors' testimony in certain respects. From our reading of the record these government witnesses were neither impeached nor was their testimony rebutted in any material respect. Some of the evidence is circumstantial. However, we need not rely on instances where the defendant cut its price after merely discussing prices or solicitation with a competitor. In the majority of these instances Empire's drastic price cuts followed express threats by its officers and employees that such price cuts would result unless there was cooperation with defendant's plans. In the face of these express declarations of intent, related by so many of the government's witnesses, we cannot accept the district court's conclusion that Empire's price cutting was done for innocent competitive reasons.

Nor can we agree with the district court that the instances related are not probative because the Empire officers or employees who delivered threats to its competitors were not shown to have any real or apparent authority with respect to pricing. Some of the statements relied on to show specific intent were made by Mr. Plaster himself, the president of Em-

pire Gas Corporation. Some threats were made by Mr. Shaddox, the defendant's senior vice-president, or other vice presidents who were shown to have authority in retail pricing. It may be true, as Empire contends, that other employees, such as its plant managers or even its district managers, did not actually have price setting authority. However, in the instances where these individuals represented their employer's wishes with regard to price or competition, or delivered ultimatums affecting these areas, the circumstantial evidence indicates they had authority to do so. This determination is obvious because in a great many instances the company delivered on these men's promises. Whether Empire's managers had authority to set prices or were acting as mere conduits between competitors and Empire officials who did have such authority makes no difference. The circumstantial evidence establishes that lower level employees, in these instances at least, had authority to convey Empire's wishes and threats, and the company itself followed up with retaliatory price cuts when in its judgment they were called for.

Specific intent to monopolize or to obtain monopoly power may be defined for purposes of section 2 of the Sherman Act as an intent to control prices or to restrict competition unreasonably. *United States* v. *Du Pont & Co.*, 351 U.S. 377, 389, 76 S.Ct. 994, 1003, 100 L.Ed. 1264, 1277 (1956). In *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 120-121, 68 S.Ct. 947, 953, 92 L.Ed. 1245, 1254 (1948),

the Court recognized that price cutting in certain circumstances could violate the Sherman Act:

> [P]rice cutting without more is not a violation of the Sherman Act. It is indeed a competitive practice which this record shows to have been common in the industry. It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors *or to bring them to their knees.* But since it is not unlawful *per se*, facts and circumstances must be adduced to show that it was in purpose or effect employed as an instrument of monopoly power. (Emphasis added.)

The specific intent which makes price cutting a monopolistic tool may take various forms. The record before us establishes that the defendant attempted to use price cuts or threats of price cuts to prevent competitors from soliciting Empire customers. Actions such as these, designed to prevent competitors from increasing their share of the market at the expense of the antitrust defendant, clearly show intent to monopolize. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 806-807, 66 S.Ct. 1125, 1137, 90 L.Ed. 1575, 1592 (1946); *see United States* v. *Grinnell Corp.*, 384 U.S. 563, 570, 86 S.Ct. 1698, 1703, 16 L.Ed.2d 778, 785 (1966).

In addition to the above actions designed to reduce competition from other retailers, the evidence establishes that many of the defendant's price cuts were designed to give Empire *control* over the retail *price* of LP gas. The defendant, through its agents, rep-

resented to competitors that because of its size other subsidiaries could carry those which had to resort to price cuts for some time in order to discipline uncooperative competitors. *See Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers*, 241 F.Supp. 476, 484 (E.D.Mo.1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966). Whether this representation was true or not, it seems obvious that the defendant wished to intimidate its competitors into raising their retail prices to the level that Empire thought would insure it a sufficient profit. Liberal price cuts reenforced the message.

These actions taken with the object of manipulating the price of LP gas to the consumer show specific intent to monopolize, as do Empire's attempts to control competitors' solicitation of its customers.

> Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa.

United States v. *Du Pont & Co.*, *supra*, 351 U.S. at 392, 76 S.Ct. at 1005, 100 L.Ed. at 1279. Accordingly, an attempt to control price, competition or both demonstrates specific intent to monopolize. We find that the government has proved both and has thus met the burden of showing that intent here.

B. Dangerous Probability of Success.

This circuit follows the majority view that proof of dangerous probability of success of an attempt to

monopolize must include a showing of the relevant market within which that probability occurred. *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, at 918 (8th Cir. 1976); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975). There are two components in the concept of relevant market: relevant product market and relevant geographic market. The district court held that neither of these components was shown by the government at trial.

1. The Relevant Product Market.

We disagree with the district court's conclusion that there was insufficient proof to establish the relevant product market.

The district court based its conclusion that the sale of LP did not constitute a distinct product market on its finding that the evidence "generally established that LP gas is functionally interchangeable in virtually every one of its common uses with such other fuels and energy sources as natural gas." Since the government does not (nor could it) contend that Empire had a dangerous probability of success in monopolizing the sale of all fuels or energy sources, this finding alone would defeat their cause. *Morton Buildings of Nebraska, Inc., supra; Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F.2d 1237, 1244 (8th Cir. 1973).

The trial judge applied an incorrect legal standard in order to determine whether LP gas sales was a relevant product market or submarket for purposes of section 2 of the Sherman Act. It is true, as he found, that other fuels will serve the same function as LP. However, the inquiry does not end there. Whether a particular product's sales constitute a relevant market or submarket depends on the cross-elasticity of demand for that product; in other words, the readiness and ability of consumers to turn to reasonable alternatives to the product in question. *United States* v. *Du Pont & Co., supra*, 351 U.S. at 394, 76 S.Ct. at 1006, 100 L.Ed. at 1280; *United States* v. *Grinnell Corp., supra*, 384 U.S. at 571, 86 S.Ct. at 1704, 16 L.Ed.2d at 786. The functional interchangeability of other products with LP is thus germane to the inquiry. *United States* v. *Du Pont & Co., supra*, 351 U.S. at 399, 404, 76 S.Ct. at 1009, 100 L.Ed. at 1282. However, *Du Pont* also makes clear that such factors as price and qualities of the product must be considered. *Id.*, 351 U.S. at 396-404, 76 S.Ct. at 1008, 100 L.Ed. at 1281. The cross-elasticity of supply would seem to be as important as the demand factor in determining relevant product market.[3] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 n.42, 336, 82 S.Ct. 1502, 1523, 8 L.Ed. 2d 510, 535 (1962); *Twin City Sportservice, Inc.* v.

[3] This is especially relevant in comparing LP gas to natural gas. Natural gas is in greater demand but in the relevant geographic market areas is not readily available.

Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir. 1975); Note, *Telex* v. *IBM* [510 F.2d 894 (10th Cir. 1975)]: *Defining the Relevant Market*, 61 Iowa L.Rev. 184, 189, 219-221 (1975).

In defining the relevant part of commerce for any product the reality of the marketplace must serve as the lodestar. *Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 325, 82 S.Ct. at 1502, 8 L.Ed.2d at 535; *Kansas City Star Co.* v. *United States*, 240 F.2d 643, 659-660 (8th Cir.), *cert. denied*, 354 U.S. 923, 77 S. Ct. 1381, 1 L.Ed. 1438 (1957). We agree that wood, coal, fuel oil, natural gas and electricity are all functionally interchangeable to a considerable degree with LP in some or all of its major uses. Because of the inferior qualities of wood, coal and fuel oil, however, there does not appear to be a high degree of cross-elasticity of demand between these products and LP. Although there was some testimony, mostly conjectural, that with recent rises in LP prices a few customers may have turned to these sources, most LP dealers testified that these fuels were not competing products even with the change in price. *See United States* v. *Grinnell Corp., supra*, 384 U.S. at 573-575, 86 S.Ct. at 1705, 16 L.Ed.2d at 787; *International Boxing Club* v. *United States*, 358 U.S. 242, 251-252, 79 S.Ct. 245, 250, 3 L.Ed.2d 270, 277 (1959); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524, 530 (2d Cir. 1958).

The qualities of natural gas and electricity, on the other hand, are comparable and perhaps even superior to those of LP gas. Because of the cost of con-

structing new natural gas pipelines and of converting LP-using facilities to electricity, however, the cross-elasticity of supply between these energy sources and LP remains low, at least for the present. *See United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510-511, 68 S.Ct. 1107, 1115, 92 L.Ed. 1533, 1544 (1948); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co., supra*, 512 F.2d at 1271. The evidence reveals that natural gas is slowly moving into the rural areas where LP is presently used, as is electricity. However, even with the rise in LP prices these products are not yet serious competitors with LP in these areas. *Cf. United States* v. *Alcoa*, 148 F.2d 416, 425-426 (2d Cir. 1945). Our conclusion, from examining all of the pertinent factors which make up cross-elasticity of supply and demand, is that LP retail sales is a relevant product market, or perhaps more accurately a relevant submarket within the energy market, within the meaning of section two. *Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 325, 82 S.Ct. at 1523, 8 L.Ed.2d at 535; *International Boxing Club* v. *United States, supra*, 358 U.S. at 251-252, 79 S.Ct. at 250, 3 L.Ed.2d at 277.

2. The Geographic Areas.

On appeal the government has relied on evidence of dangerous probability of success in only the Lebanon and Wheaton areas. At trial the United States attempted to show that there was a dangerous probability that Empire would be successful in obtaining

monopoly power in 13 different geographic areas. Seven of these, including the Wheaton and Lebanon areas, were areas designated in a report prepared by Empire which estimated where its sales were for certain bulk plants, and these seven areas were more or less contiguous. Two of the seven contiguous areas, the Lebanon and Niangua areas, overlapped each other. In their market report Empire also named the companies which it thought retailed LP in each of Empire's sales areas, and estimated the approximate percentage of the market each of these various competitors held. The report was not intended to be an admission of the relevant geographic market areas. The government altered some of the sales areas submitted by Empire and designated them as relevant geographic markets. The seven contiguous areas were designated as geographic markets without change. No reasons were given for acceptance or rejection of any of the areas, nor were the criteria used in selecting areas entered into evidence, despite repeated requests therefor by the judge. In fact, the government was unable to say who had drawn any of the lines which delineated its 13 areas. The plaintiff did attempt to learn whether there were other competitors not mentioned in Empire's report, but did not find any in the Lebanon and Wheaton areas, at least.

The sales area of a defendant is not necessarily the same as the relevant geographic market for antitrust analysis. The relevant geographic area is that in which the seller competes for distribution of his

product and to which the buyer can turn for alternative sources of supply. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 362, 90 S.Ct. 2035, 2042, 26 L.Ed.2d 658, 671 (1970); *see Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, at 918 (8th Cir. 1976). The parties agree that generally a retailer markets LP in an area within a 20 to 30 mile radius of his bulk plant, but some retailers testified that they sell as far as 50-60 miles away. Both the Lebanon and Wheaton areas are considerably smaller in area than a circle with a 20 mile radius. It has sometimes been held that a national company such as Empire should be considered as competing within a national market area although local outlets carried on its day to day operations. *United States* v. *Grinnell Corp.*, *supra*, 384 U.S. at 575, 86 S.Ct. at 1706, 16 L.Ed.2d at 788; *American Football League* v. *National Football League*, 323 F.2d 124, 130 (4th Cir. 1963).

We are aware that a certain amount of fuzziness is often inherent in the task of defining a relevant geographic market, and the final decision must often be a compromise. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 360-361, 83 S.Ct. 1715, 1739, 10 L.Ed.2d 915, 943 (1963). Nevertheless we have misgivings about the government's method, or lack of method, of designating Wheaton and Lebanon as relevant geographic markets or submarkets. While we might not accept them in another case, we do so for purposes of this appeal in view of the result we

reach on the question of dangerous probability of success.

3. Dangerous Probability of Success.

The record shows that the LP gas business is highly competitive in the Lebanon and Wheaton markets as elsewhere. The defendant has many competitors wherever it does business, and new ones spring up frequently. The barriers to entry in this industry are minimal; all that are needed are a supply of LP, a truck, and perhaps a storage tank.

The United States conducted a survey which purported to show that Empire had about 50% of the market in dollars' sales in the Lebanon area and 47% in Wheaton. We agree with the district court that the survey's reliability was extremely doubtful.[4] The questionnaire upon which it was based did not specify any records that should be used in submitting responses and the government's witness did not know what records were used. One of the government's witnesses who responded to the questionnaire testified that the figures he submitted came "off the top

[4] The government disregarded the court's order that the questionnaire to be used be submitted for its approval and that the court's subpoena power would be used in securing responses, and sent out its own questionnaire without the court's knowledge. The reason for following this procedure is far from clear, but it appears to us that the government would have benefited in many respects if it had been more cooperative with the court. It is regrettable that this dispositive question must be determined on an inadequate and incomplete record.

of my head." The government made no real attempt to verify any of the figures in the responses. Data were collected for only one year, 1972. *Cf. American Tobacco Co.* v. *United States*, 328 U.S. 781, 790, 66 S.Ct. 1125, 1129, 90 L.Ed. 1575, 1583 (1946).

But even if we accept the government's survey as proof that Empire had 50% of the Lebanon market and 47% of the Wheaton market, that alone is not sufficient to show a dangerous probability of success. *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 994 (8th Cir. 1968), *cert. denied*, 395 U.S. 961, 89 S.Ct. 2096, 23 L.Ed.2d 748 (1969); *United States* v. *Alcoa, supra*, 148 F.2d at 424. It is the theory of the United States, however, that Empire's large market shares in conjunction with its anti-competitive conduct, discussed *supra*, gave rise to a dangerous probability that it would be able to control prices in the Lebanon and Wheaton markets. The record, however, reveals no instance in which competitors *in these areas* were susceptible to Empire's intimidation. There is insufficient proof that the competitors of Empire: (a) raised or fixed prices because of Empire's threats; (b) stopped soliciting Empire customers, or (c) decided not to enter the LP business or decided to leave the business on account of defendant's actions.

The government relies heavily on the testimony of its expert economist to show dangerous probability. The economist testified that a greater likelihood of monopoly power existed because of Empire's size and anti-competitive practices. He also felt that the price trends in the Lebanon and Wheaton markets were in-

dicative of monopolistic power. In the former area he found prices to be steadily rising and at a high level and in the latter area prices were extremely stable: both patterns characteristic of monopoly, according to the economist. Finally, he found Empire's profitability to be significantly higher than other LP businesses or American industry as a whole, which indicated monopoly power. The expert testified that by looking at industry structure performance he could conclude that there was a dangerous probability that Empire would attain or had attained monopoly power, but he would not attempt to reach a conclusion without looking at all three factors.

We have several problems with the expert's testimony, as did the district court. It was brought out that the LP companies whose performance he compared with defendant's were not really comparable, since Empire is an undiversified company and the other two companies derived from 29 to 53 percent of their sales from industries unrelated to LP. While Empire's profits from 1963 to 1973 averaged 11.1 percent, according to the economist, we do not regard these profits as being so extremely high that we must necessarily conclude that Empire was successful in manipulating prices or competition in the relevant market areas.

The government attempts to contrast prices and the trend of prices between Lebanon and Wheaton and other areas, such as Niangua and Springfield. We do not find these comparisons persuasive. First, the government states that prices in Lebanon averaged three

cents higher than those in the nearby Niangua area for the period from May 16, 1966, to mid-August 1970. A government witness testified that he found the average price for Empire's Lebanon subsidiary over this period was 16.7 cents, while the price for its Niangua subsidiary averaged 13.7 cents. The witness testified that he reached this result by adding all of the authorized price changes made during this period and dividing that sum by the number of such prices. On cross examination it was brought out that this failed to account for the gallons sold at each price. In other words, a price of 17 cents was given the same weight as a price of 15, even though one gallon may have been sold at the former price and a thousand gallons could have been sold at the latter. We also find that no consideration was given to the length of time a given price was in effect. Therefore a price of 17.9 cents, which was in effect for two days in the Lebanon area, is given the same weight as a price of 16.9 cents which was effective for over seven months.

These same errors infect graphs prepared by the government's expert economist. These graphs purportedly show that prices in the Lebanon area were high and trending steadily upward, and that prices in the Wheaton area tended to be extremely stable. Other graphs, for the Niangua and Springfield areas, suppposedly show the norm in price trends where there are no barriers to competition. There are six of these graphs in all, reflecting periods ranging from slightly more than a year for some subsidiaries to

over six years for others. As previously mentioned, there is no weight attached according to the time a particular price was in effect. In order to rectify this and to compare prices in various markets during the same time periods, this court recharted the prices on a single graph with the horizontal axis reflecting the time periods during which the prices were in effect and the vertical axis depicting price per gallon. We believe that this more accurately reflects the trends in price and permits a more meaningful comparison of the Lebanon and Wheaton markets with the others. This graph reveals the following:

1. The price trend in the Wheaton area, rather than being extremely stable in comparison to the Niangua area as argued by the government, does not appear to differ appreciably as far as stability is concerned from that in Niangua.

2. The prices in the Springfield area are not reflected over a long enough period during which Lebanon and Wheaton prices are also available to be meaningfully comparable.

3. The prices of Empire's Lebanon subsidiary did appear to be higher than in some other areas, but certainly did not average three cents over those in Niangua. In fact there was rarerly three cents' difference between the two.

We do not consider the price trends reflected to be of much significance, especially since gallons sold are not considered. This would seem to be of some importance, since the testimony established that LP

sales are extremely seasonal, being, as one would expect, heavy in winter and light in summer.

Taking the evidence of dangerous probability of success as a whole, as is proper in an antitrust case, *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 691 (8th Cir. 1966), we cannot find the requisite proof. The government established that: (a) Empire had a large share of the market in Lebanon and Wheaton in 1972; about 50%, (b) it has engaged in anticompetitive conduct in various areas, which has not been shown to have been effective in the Lebanon or Wheaton areas; (c) the price of LP in Lebanon may be slightly higher than in some other areas, but the reasons for this are a matter of speculation; (d) the defendant has had a fairly high rate of profit for the past ten years. We cannot conclude from this inconclusive evidence that there is a dangerous probability that the defendant will be able to monopolize the LP gas business, or exert control over prices or competition in the Lebanon or the Wheaton market areas. Therefore, we hold that the district court was not clearly erroneous when it found that the government failed to prove dangerous probability of success in its attempt to control competition or its attempt to raise prices by price intimidation. *See American Tobacco Co.* v. *United States, supra,* 328 U.S. at 784-787, 66 S.Ct. at 1126, 90 L.Ed. at 1580.

II. *Unreasonable Restraint of Trade.*

It is the United States' position on appeal that the defendant violated section 1 of the Sherman Act, 15 U.S.C. § 1, by obtaining numerous covenants not to compete from those whose companies it acquired and from its own employees. According to the government there were 3,239 such covenants signed by employees of Empire between August 1963 and November 1971. There were also 81 different acquisition agreements which contained noncompetition agreements between August 1963 and August 1973.[5] Both the employee and the acquisition agreements vary greatly as to duration and geographic scope of the covenants not to compete.

Covenants not to compete executed in conjunction with the purchase of a business allow the purchaser to obtain the value of the good will for which he has paid. Generally such covenants are valid if reasonably limited in time and geographically in order to serve this valid business objective. *E.g. Goldberg* v. *Tri-States Theatre Corp.*, 126 F.2d 26, 29-32 (8th Cir. 1942); *see generally Annot.*, 46 ALR 2d 119 (1956); Annot., 45 ALR 2d 77 (1956). Employee covenants not to compete prohibit the employee from competing after his employment is terminated. Such agreements must also be reasonably limited in area

[5] Many of the acquisition convenants required the seller to obtain other convenants from stockholders, employees, or family members of the seller. Therefore we do not know how many covenants pursuant to Empire's purchases of other businesses are involved.

and duration, *see generally* Annot., 43 ALR 2d 94 (1955); Annot., 41 ALR 2d 15 (1955) and moreover, it must usually be shown that the employee was in a position to obtain valuable personal contacts or trade secrets because of his employment which might be lost to the employer if the employee entered into competition. Blake, *Employee Agreements Not to Compete*, 73 Harv.L.Rev. 625, 653 (1960).

Covenants of these two types have not generally been considered violative of the antitrust laws. *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). However, in *Schine Chain Theatres, Inc* v. *United States*, 334 U.S. 110, 119, 68 S.Ct. 947, 952, 92 L.Ed. 1245, 1253 (1948), the Court recognized that such agreements, even if legal under local law, could be unlawfully used in restraint of trade.

The record in this case reflects that the successful retail sale of LP depends on a considerable extent on the route salesman who delivers the product by truck. In some instances, according to the testimony, a company has been able to obtain a considerable number of its rival's customers by the simple expedient of hiring its rival's route man, who knows where and who the customers are and has developed a personal relationship with them. Most of the employee covenants not to compete about which there is testimony in the record appear to concern employees

of this nature or those with access to customer lists.[6] The government asserts, however, that many of the employees who signed noncompetitive covenants did not occupy a position which gave them customer contact or access to confidential information, and thus those covenants were unreasonable restraints of trade.

The government further argues that the employee covenants and the acquisition covenants are unnnecessarily restrictive in time and area to protect Empire's legitimate business interests. Finally they contend that the practice of obtaining agreements from such a large number of potential competitors constitutes a restraint of trade in itself regardless of the validity of individual contracts.

The difficulty with the government's position is that there is no showing that any restraint was unreasonable so as to violate the Sherman Act. Counsel for the United States apparently believes that the burden is on Empire to establish the reasonable-

[6] In addition to route salesmen and managerial personnel the government introduced evidence concerning Mrs. Sarah Ann Guy, a clerical employee who was sued for enforcement of a covenant after she left Empire. Her testimony revealed that she had worked with defendant's accounts receivable during her employment and afterwards she went to work for an accountant who did work for various LP businesses. The lawsuit was settled when Mrs. Guy stipulated that she would not solicit Empire business or customers as of the date she was terminated. It is reasonable to assume that by the nature of her work with accounts receivable Mrs. Guy would have access to customer lists. Many of the acquisition covenants explicitly required that the seller not reveal such lists to Empire competitors.

ness of each of the more than 3,000 contracts with their varying terms. However, the burden of showing unreasonableness of a restraint of trade, except where there is a *per se* violation of the Act, is on the plaintiff. *Alders* v. *AFA Corp.*, 353 F.Supp. 654, 657-658 (S.D.Fla.1973), *aff'd mem.*, 490 F.2d 990 (5th Cir. 1974); *see United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n. 5, 87 S.Ct. 1865, 1863, 18 L.Ed.2d 1249, 1257 (1967). In addition the record is barren as to the actual effect of these covenants on competition in the LP retail market. *White Motor Co.* v. *United States*, 372 U.S. 253, 261-263, 83 S.Ct. 696, 700, 9 L.Ed.2d 738, 745 (1963); *Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683, 687 (1918). We agree with the district court's conclusion that the mere existence of a large number of covenants not to compete does not establish a 15 U.S.C. § 1 violation.

III. *Conclusion.*

We conclude that the district court was not clearly erroneous in holding that the government failed to prove a dangerous probability of success in an attempt to monopolize under section 2 of the Sherman Act and that it correctly determined that there was insufficient proof to show an unreasonable restraint of trade under section 1. Accordingly the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
W. D. MISSOURI, W. D.

No. 20485-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPIRE GAS CORPORATION, DEFENDANT

May 6, 1975

MEMORANDUM AND ORDER

JOHN W. OLIVER, District Judge.

I.

The transcripts of both the pretrial and trial proceedings in this case reflect the difficulties encountered in getting this case to trial on the merits. Although we denied defendant's motion to dismiss for plaintiff's failure to comply with this Court's post-trial order [Tr. 2101] in regard to the manner in which plaintiff's proposed findings of fact and proposed conclusions of law were to be submitted, our post-trial memorandum and order of May 22, 1974, recognized that it was quite apparent that plaintiff had not in fact complied with our directions that all proposed findings of fact were to be stated in "separately numbered sentences, appropriately supported by reference to the documentary or other evidence

which has been adduced at trial" and that all proposed conclusions of law were to be stated in separately numbered paragraphs "in precisely the language which the government believes is applicable to the case."

Plaintiff's original proposed findings of fact, 269 pages in length, consisted of 331 numbered multi-sentence paragraphs (pages 1-170) and an "appendix to acquisition findings" (pages 171-269) which contained no paragraph numbers whatever and which, for the most part, merely quoted particular paragraphs from defendant's acquisition contracts made during the years 1963-1973. That appendix also contained raw data concerning the purchase price paid, the storage capacity of the seller, the number of customers served, the volume of L-P gas sold, and, in some isolated instances, an estimate of the percentage of the market within a "trade area."

During the pendency of defendant's post-trial motion to dismiss, plaintiff amended its original filing by adding and numbering what it now calls 20 "separate headnotes." Plaintiff's failure to follow our post-trial directions makes it impossible for this Court to follow its usual practice in nonjury cases under which all proposed findings of fact and suggested conclusions of law submitted by both parties are considered and discussed with the precision implicit in the admonition stated in United States v. El Paso Gas Co., 376 U.S. 651, 656-57, 84 S.Ct. 1044, 12 L.Ed.2d 12, most recently reiterated in footnote 13 in United States v. Marine Bancorporation, 418

U.S. 602, 615, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974). Indeed, the Court would be warranted in granting various of the defendant's motions to dismiss based upon the manner in which plaintiff has failed to comply with particular procedural orders made throughout the case.

It is our view, however, that cases should be decided on the merits rather than on procedural grounds. We shall accordingly make findings of facts on the merits in regard to what we believe was established by the weight of the credible evidence and state the conclusions of law applicable to those findings. Judgment will be rendered in favor of the defendant.

II. FINDINGS OF FACT

1. On August 14, 1972, plaintiff United States of America filed its original complaint alleging that defendant Empire Gas Corporation and its various wholly-owned subsidiaries had violated Section 2 of the Sherman Act. An amended complaint was filed on June 22, 1973, in which an alleged violation of Section 1 of the Sherman Act was for the first time alleged.

2. Defendant Empire Gas Corporation (hereinafter "Empire") is a corporation organized and existing under the laws of the State of Missouri since 1963, with its principal place of business in Lebanon, Missouri.

3. Empire, through and in conjunction with its wholly-owned subsidiaries (the term "Empire" shall include these subsidiaries unless indicated otherwise)

is and has been principally engaged in the retail and wholesale sale of liquefied petroleum gas in various states.

4. Liquefied petroleum gas (hereinafter "LP gas") includes various gases of the methane series which have been compressed into a liquid state, principal examples of which are propane and butane.

5. A substantial part of the LP gas which Empire purchases and resells regularly and continuously moves in interstate commerce.

6. Plaintiff alleged in its amended complaint that beginning in 1963 and continuing up until June 22, 1973, "the defendant and co-conspirators have entered into contracts, combinations, and conspiracies to unreasonably restrain * * * interstate trade and commerce in the distribution and retail sale of LP gas * * *" in violation of Section 1 of the Sherman Act. We find that plaintiff failed to prove that Empire has at any time entered into any such contract, combination or conspiracy.

7. Plaintiff also alleges that beginning in 1963 and continuing up until June 22, 1973 "the defendant has attempted to monopolize * * * interstate trade and commerce in the distribution and retail sale of LP gas in various local marketing areas within the State of Missouri and other states in which the defendant operates * * *," in violation of Section 2 of the Sherman Act. We find that plaintiff failed to prove that Empire has at any time attempted to monopolize the distribution and retail sale of any product in any relevant market area.

8. We further find that in regard to Empire's alleged violation of Section 2, plaintiff failed to prove that LP gas is a relevant product market constituting a "part of the trade or commerce," within the meaning of that Section. Although the evidence offered by plaintiff did not focus with particularity on the question presented, it generally established that LP gas is functionally interchangeable in virtually every one of its common uses with such other fuels and energy sources as natural gas.

9. Plaintiff, in an effort to prove various "local marketing areas" in which Empire allegedly attempted to monopolize the distribution and retail sale of LP gas, offered thirteen exhibits, each bearing a different designation such as "Lebanon Market Area" [GX 151-B], which purport to be various sections of road maps upon which dark, continuous lines of varying size and shape have been drawn. No credible evidence was adduced to establish the methodology or underlying data used in drawing these lines. Indeed, the Court still does not know how, why, and by whom the lines were drawn. The testimony of a Department of Justice staff economist suggests that the lines were drawn by some member of plaintiff's legal staff prior to that economist's initial contact with this lawsuit. No evidence was adduced to qualify the unidentified lawyer as an expert. In short, we find that plaintiff did not offer any credible evidence to prove that its "local marketing areas" did in fact reflect areas in which any LP gas companies

effectively competed, or areas to which any purchasers could practically turn for their supplies of LP gas.

10. Even if it could be assumed that plaintiff's evidence could be said to have established appropriate geographical areas, we find that plaintiff failed to offer any credible evidence sufficient to establish that Empire in fact possessed a specific intent to achieve a monopoly or to acquire monopoly power in the distribution or retail sale of LP gas.

11. In further regard to the Section 2 geographic market question, we expressly find that the plaintiff failed to adduce any credible evidence, circumstantial or otherwise, that Empire at any time had a dangerous probability of success in achieving a monopoly or in acquiring monopoly power in the retail sale or distribution of LP gas or of any other "part of the trade or commerce" any relevant geographic market. Indeed, we find that the undisputed data in evidence tends to establish that during the relevant time period Empire's annual retail sales of LP gas have declined, both in terms of gallons sold and dollars received, in each of plaintiff's alleged market areas and that during the same time period Empire's "market share" has declined in each of the alleged market areas. Other LP gas companies experienced no difficulties in entering each of the alleged market areas and many of the new entrants experienced steadily increasing retail sales and profits. Particular established LP gas companies in each of the alleged thirteen market areas had increasing retail sales, profits, and "market shares."

We expressly find that the "survey" conducted by the plaintiff, which purported to utilize a questionnaire format, and which reflected plaintiff's election to ignore this Court's pretrial order of July 17, 1973, under which an approved survey procedure would have been established, did not demonstrate or even tend to demonstrate that Empire ever had a dangerous probability of success in achieving a monopoly or in acquiring monopoly power in the distribution or retail sale of LP gas.

12. In regard to paragraph 13a of plaintiff's amended complaint which alleged that Empire "acquired and attempted to acquire the assets or stock of a substantial number of LP gas distributor competitors and potential competitors of Empire," plaintiff did offer testimony and documents which established that Empire did in fact enter into a number of agreements whereby it purchased certain assets or stock of various LP gas businesses. We find, however, that proof of the number of asset purchases, and proof that Empire grew in physical size did not, under the circumstances of this case, demonstrate or tend to demonstrate the effect or likely effect that such asset purchases may have had upon trade or commerce in any relevant geographic area.

13. Plaintiff also alleged in paragraph 13b of its amended complaint that Empire has "entered into and attempted to enter into agreements and understandings whereby Empire agreed with LP gas distributor

competitors that they would not compete for or accept from each other's customers." We find that the evidence adduced in regard to the May 8, 1963 Propane Corporation agreement, which was apparently ancillary to the purchase of Super Propane Corporation by Warren Petroleum Corporation, is clearly insufficient to establish plaintiff's claim.

14. We find plaintiff also failed to adduce sufficient credible evidence to establish its allegations in paragraph 13c of its amended complaint that Empire has "entered into or attempted to enter into agreements and understandings whereby Empire and LP gas distributor competitors agreed not to sell in each other's marketing areas."

15. In regard to plaintiff's allegation in paragraph 13d of its amended complaint that Empire "sold and threatened to sell LP gas at prices which were below cost, or at prices which were substantially reduced or lower than prices charged by Empire in other areas, for the purpose of coercing and inducing LP gas distributors competing with Empire to (1) increase their LP gas prices, (2) stop soliciting the customers of Empire, and (3) sell out to, or cause or refrain from doing business in competition with, Empire," we find that plaintiff did not offer sufficient credible evidence to establish that Empire ever sold or threatened to sell LP gas at or below its cost, or that Empire ever reduced its LP gas prices for the purpose so alleged. We expressly find that the three exhibits purportedly demonstrating "Below-Cost Pricing," in one of its thirteen alleged market areas [GX

172, GX 173 A-B, and GX 174], were not prepared in accordance with standard accounting practices and procedures, and that they have little or no probative value. We further find that the evidence adduced by plaintiff in regard to various instances where one or more of Empire's subsidiaries in fact reduced retail LP gas prices in particular areas established only the dates and amounts of such reductions, and was insufficient to carry the factual burden of proving the effect of the various price reductions upon trade or commerce, or the purpose or intent of Empire in making them. There is substantial evidence in the record, developed principally upon cross-examination of plaintiff's own witnesses, which tended to establish that many of the price reductions were made in response to competitive conditions, as they existed in a particular geographic area.

16. We find that plaintiff failed to carry the burden of proving that Empire "attempted to injure or destroy and threatened to injure or destroy the business or property of LP gas distributors where said distributors solicited customers of Empire or refused Empire's request that they raise their LP gas prices," as alleged in paragraph 13e of plaintiff's amended complaint.

17. We find that plaintiff failed to prove that Empire "entered into and attempted to enter into price fixing agreements with LP gas distributors to increase LP gas prices," as alleged in paragraph 13f of plaintiff's amended complaint. Indeed, the record is clear that witness after witness called by plaintiff testified that neither he nor his respective

LP gas company had ever entered into any price fixing agreement with Empire or any of its directors, officers, employees, or agents.

18. Plaintiff did prove that Empire "entered into covenants not to compete with a substantial number of individuals, companies, and corporations who were actual or potential LP gas distributor competitors of Empire," as it alleged in paragraph 13g of the amended complaint. We find, however, that the evidence adduced in that regard was sufficient only to establish the number of such covenants and the terms of the various contracts. We find that plaintiff did not offer sufficient credible evidence to demonstrate or tend to demonstrate that the covenants, standing alone, constitute an unreasonable restraint of trade or commerce. We further find that the evidence adduced in regard to the covenants, when considered in light of all of the other evidence adduced by plaintiff, was insufficient to support plaintiff's claims.

19. We find in regard to plaintiff's allegation in paragraph 13h of its amended complaint that Empire "utilized purchases or potential purchases by Empire and its employees to coerce and attempt to coerce, induce or persuade certain of Empire's suppliers and potential suppliers of goods and services to stop buying LP gas from the other LP gas distributors and agree to buy their requirements of LP gas from Empire," that there is no credible evidence that Empire, or any of its directors, officers, employees or agents, ever coerced or attempted to coerce

any of its suppliers or potential suppliers to agreed to buy their LP gas from Empire. We further find that there is no evidence in this record to support a finding of any bilateral reciprocal agreement between Empire and any other entity or individual.

20. In regard to plaintiff's allegation that Empire "bought vexatious lawsuits against competitors as an exclusionary tactic," we find that plaintiff failed to carry the burden of proving that the lawsuits that Empire brought against various LP gas distributors or their owners, officers, or employees were in fact vexatious under the circumstances and that such lawsuits, individually or taken together, constituted a restraint of trade or commerce.

21. We find that plaintiff failed to prove that one of the effects of Empire's alleged illegal activities is that "competition between LP gas distributors in the sale of LP gas to consumers has been suppressed or eliminated," as alleged in paragraph 14b of the amended complaint. Plaintiff did not offer any credible evidence which even tended to establish that competition between any LP gas distributors has been suppressed or eliminated. The undisputed evidence in this case establishes that intense competition generally existed at all relevant times throughout the LP gas industry and, in particular, in each of plaintiff's thirteen alleged market areas. We so find.

22. We find that plaintiff failed to prove its allegation in paragraph 14c of its amended complaint

that another effect of Empire's alleged illegal activities is that "LP gas distributors have been excluded from, or impeded, injured, obstructed and harassed in, the business of selling LP gas." We accept the testimony of plaintiff's own witnesses which conclusively established not only the number of new entrants into the thirteen alleged market areas, but also the ease with which various LP gas companies have profitably entered these alleged market areas.

III. CONCLUSIONS OF LAW

1. This Court has jurisdiction over both the parties and the subject matter.

2. Plaintiff failed to carry the burden of proving that Empire has ever entered into any "contract, combination * * * or conspiracy in restraint of trade or commerce," in violation of Section 1 of the Sherman Act. Such proof is essential to establish a violation of Section 1 of the Sherman Act; unilateral action does not violate that section. See United States v. National Malleable & Steel Castings Co., 358 U.S. 38, 79 S.Ct. 39, 3 L.Ed.2d 44 (1958), Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954). Plaintiff must also prove that the parties possessed an intent to act in concern. See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967); United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); and Interstate Circuit, Inc. v. United States, 306 U.S.

208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). We conclude that under the facts as we have found them, plaintiff failed to carry the burden of proof imposed on it by applicable law.

3. Plaintiff failed to carry the burden of proving that Empire ever monopolized, attempted to monopolize, or combined or conspired to monopolize "any part of the trade or commerce," in violation of Section 2 of the Sherman Act, in that the weight of the credible evidence did not establish (a) the existence of any relevant geographic or product market; (b) that Empire at any time possessed a specific intent to achieve a monopoly or acquire monopoly power; or (c) that Empire at any time had a dangerous probability of success in achieving a monopoly or in acquiring monopoly power.

The relevant geographic market under Section 2 of the Sherman Act must be determined in terms of "the commercial realities of the market," and must be "economically significant." Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed. 2d 510 (1962). The primary test of an economically significant market area which corresponds to "commercial realities" is that "area in which the seller operates, and to which the purchaser can practicably turn for supplies." Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961); Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962); United States v. Philadelphia National Bank, 374 U.S. 321, 361, 83

S.Ct. 1715, 10 L.Ed.2d 915 (1963); United States v. Phillipsburg Nat'l. Bank & Trust Co., 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970). This test was recently reaffirmed by the Supreme Court in United States v. Marine Bancorporation, Inc., 418 U.S. 602, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974). Plaintiff's evidence did not establish the relevant geographic markets required under applicable law.

A relevant product market must also be proven, Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269 (8th Cir. 1973). The relevant product market must be determined in terms of "[M]arket alternatives that buyers may readily use for their purposes," United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 394, 76 S.Ct. 994, 1006, 100 L.Ed. 1264 (1956). See also United States v. Continental Can Co., 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); United States v. General Dynamics Corp., 341 F.Supp. 534 (N.D.Ill.1972), aff'd. 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 930 (1974). Plaintiff failed to prove that LP gas was in fact a relevant product market or submarket. Plaintiff attempted to base its required proof of relevant markets on a survey which, in turn, was based upon a questionnaire which it elected to use rather than comply with an express order of court. This Court, pursuant to its standard procedures and in accordance with the Manual for Complex Litigation, (§ 2.70 et seq.), established a procedure in Pretrial Order No. 1 (July 17, 1973) under which plaintiff was directed to prepare a survey questionnaire, submit

that proposed questionnaire to the defendant and thereafter to the Court in order that all questions of adequacy and admissibility could be determined prior to its use. That procedure contemplated that the Court would issue a court-approved questionnaire to intended recipients under power of subpoena. For reasons never explained, plaintiff refused to comply with those directions and elected to mail an unapproved questionnaire, all of which substantially complicated plaintiff's ability to carry the burden of proof imposed on it by law.

In accordance with our standard practice in nonjury cases, we admitted plaintiff's survey in evidence subject to defendant's objections. When plaintiff's principal survey witness was examined for the purpose of establishing a proper foundation for admitting the survey into evidence, it became clearly apparent that the witness disclaimed any qualification as an economist [Tr. 80] and that his function in regard to the survey had in fact been no more than that of a "bookkeeper" [Tr. 1022]. The testimony of various witnesses revealed that the manner in which the data was gathered by plaintiff's unauthorized questionnaire did not insure either its accuracy or reliability. Even if it be assumed that a proper foundation for plaintiff's survey had been established, plaintiff's evidence falls far short of proving the essential element of "dangerous probability" required in every Section 2 action. Plaintiff's survey, when considered in light of all the other circumstances, established the entry of new competitors in each of

the alleged market areas and the ease with which such entry was and could be made.

IV.

The findings of fact and conclusions of law above stated adequately dispose of this litigation. We shall amplify those findings and conclusions in order that the rationale upon which our ultimate conclusion that plaintiff failed to carry the burden of proof imposed on it by law be clearly stated. We do so in the hope that what will be said will improve the administration and enforcement of the antitrust laws of the United States. It is apparent that many of our findings of fact are directly keyed to specific allegations of the plaintiff's amended complaint. We followed that pattern in order to state in this part of this opinion the reasons why the evidence adduced by the plaintiff was not sufficient to prove its case.

The first eleven paragraphs of our findings of fact need no elaboration or discussion of legal authority. We proceed therefore with the remaining paragraphs of our findings of fact:

Paragraph 12 of our findings of fact related to defendant's stock and asset acquisitions. Plaintiff introduced in evidence defendant's records which reflected defendant's stock and asset purchases over the years. That evidence, of course, shows that defendant has grown through such purchases. That evidence does not, however, prove any specific intent on defendant's part to monopolize any particular market by those acquisitions. Plaintiff adduced no

evidence, for example, that defendant used any of the acquisitions to "underwrite the losses of local price-cutting campaigns," as was the case in Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1954). Proof that the defendant made a number of asset purchases, most of which were located outside of plaintiff's thirteen alleged market areas, simply does not constitute proof that defendant violated Section 2 of the Sherman Act.

Plaintiff's proof must be made in connection with a defined market area. Agrashell, Inc. v. Hammons Products Co., *supra*, and Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237 (8th Cir. 1973). Purchases of assets located outside defendant's alleged market areas are clearly irrelevant. Neither size, United States v. United States Steel Corp., 251 U.S. 417, 40 S.Ct. 293, 64 L.Ed. 343 (1920), nor mere number of acquisitions, standing alone, is proscribed by the Sherman Act. United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948), citing United States v. United States Steel Corp., *supra*. It is therefore apparent that proof of the number of defendant's acquisitions, absent a showing of their impact or effect on plaintiff's thirteen alleged market areas, is not sufficient to establish a Section 2 violation.

Paragraphs 13 and 14 of our findings of fact relate to plaintiff's effort to adduce sufficient evidence to sustain the allegations of plaintiff's amended complaint which claimed that the defendant allocated markets or customers with its competitors. Plaintiff

did introduce in evidence (1) an agreement not to compete between Super Propane Corporation and Robert W. Plaster, entered into before defendant came into existence; (2) a territorial allocation between Plaster and Arthur Gas Company, again before defendant was incorporated; and (3) various transfers of customers from one of defendant's subsidiaries to another.

Assuming that the evidence would support a finding that defendant somehow became a party to the Super Propane and Arthur Gas Company agreements (an assumption that is difficult to make), the evidence is clear that neither agreement was ever enforced after defendant's incorporation. Unenforced agreements, even when proven, do not violate the Sherman Act. See American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131 (2d Cir. 1971); Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir. 1968), citing United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1965); United States v. Eaton Yale & Towne, Inc., 1972 Trade Cases, ¶ 73,889 (D.Conn.1972); Ansul Co. v. Uniroyal, Inc., 306 F.Supp. 541 (S.D.N.Y.1969). Quite contrary to plaintiff's claim, the evidence in this case established increased competition between defendant and Super Propane after defendant's incorporation, including massive solicitation of each other's customers. That evidence also established that defendant and Arthur Gas Company did not stay

out of each other's sales areas. Plaintiff's evidence was obviously insufficient under the circumstances.

Paragraph 15 of our findings of fact related to plaintiff's claim that defendant had in fact engaged in predatory pricing practices within the rule of such cases as Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245 (1948); Moore v. Mead's Fine Bread Co., *supra*; National Dairy Products Corp. v. United States, 350 F.2d 321 (8th Cir. 1965); and Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F.Supp. 453 (W.D.Pa.1968).

This Court has had experience in evaluating the manner in which predatory price evidence must be obtained before trial and adduced in evidence. For we sat as the trial judge in *National Dairy Products*. In sharp contrast with the evidence adduced in that case, plaintiff in this case simply failed to properly prepare whatever case it may have had before trial and was therefore not in a position to prove at trial that defendant's pricing was predatory at any particular time or any particular place. There was, of course, some evidence of infrequent price decreases within the thirteen alleged market areas. But plaintiff's own witnesses testified that defendant was responding to competitive forces which were in play on those occasions. It is clear that in particular areas defendant directed price decreases in an attempt to regain customers who had been lost to competitors who prior to that time had been selling at lower prices than had the defendant or one of its subsidiaries.

Evidence that a particular defendant did in fact engage in price cutting, or even in below-cost pricing, does not, standing alone, constitute proof of predatory pricing. Indeed, evidence of such activity could in fact be said, under the circumstances of a particular case, to be evidence of the existence of a highly competitive market. See Cooper, "Attempts and Monopolization: A Mildly Expansionary Answer to the Riddle of Section Two," 72 Mich.L.Rev. 374, 437 (1974).

The point of the whole matter is that plaintiff, in a quite haphazard manner, adduced some evidence concerning defendant's pricing in a few isolated instances, but did not even attempt to adduce any additional and supplemental evidence upon which a finding of predatory pricing could be properly based.

Paragraphs 16, 21 and 22 of our findings of fact relate to plaintiff's failure to carry the burden of proof that defendant attempted to or threatened to injure or destroy the business or property of its competitors and the effect which the alleged threats allegedly had on those competitors.

The general quantum and weight of plaintiff's "evidence" to prove its expansive claims in this regard is best illustrated by reference to plaintiff's apparently serious effort to incorporate virtually the entire transcript of the trial of United States v. Empire Gas Corp., et al. Criminal No. 23917-1, into the record in this case as a basis upon which plaintiff could predicate findings of fact in this case. Defendant, of course, was acquitted in the trial of the criminal

case. It must also be remembered that plaintiff, after that acquittal, dismissed Count I of the criminal indictment which alleged a violation of Section 2 of the Sherman Act.

An example of plaintiff's attempted use of the transcript of the record of the criminal trial is illustrated by its proposed finding of fact No. 97f, which suggests that this Court should find as a fact that "Harold Smith, acting as an agent of defendant, in February, 1969, procured Alfred Earl Harflinger and James William Nash to destroy a newly purchased LP gas bulk delivery truck owned by Leslie Heriford in Ava, Missouri . . . ."

Plaintiff has also sought to base similar proposed findings of fact on testimony given by particular persons who testified before one of the three separate grand juries involved in this case and the testimony of other persons whose depositions were taken before trial. In regard to the criminal trial testimony, plaintiff long before trial conceded that it "cannot seriously argue that the witnesses whose testimony from the criminal trial is desired for the civil trial are unavailable." (See page 30 of plaintiff's Memorandum filed March 16, 1972).

In spite of procedures established in an early stage of the actual trial in regard to whether deposition testimony would be admitted (see Tr. 361-376), plaintiff did not attempt to make any appropriate showing in regard to the lack of availability of any of the particular witnesses whose deposition or grand jury testimony plaintiff wished to have admitted in

evidence. And plaintiff elected to pursue that course of action in the face of its nationwide subpoena power.

We believe it clear under the authorities to which we directed plaintiff's attention at an earlier stage of the trial, (Tr. 365-368) that the deposition testimony may not properly be considered because of plaintiff's failure even to attempt to make the showing required by Rule 32(a)(2), (3). We are also of the opinion that application of similar principles would probably require exclusion of the grand jury and criminal trial testimony.

Consistent, however, with our view that cases should be decided on the merits rather than on procedural grounds, we have read and considered all of the criminal trial, deposition, and grand jury testimony upon which plaintiff attempts to rely to support its various proposed findings of fact as though such testimony was not subject to any objection. That consideration sustains Judge Learned Hand's oft-quoted observation in Napier v. Bossard, (2nd Cir. 1939) 102 F.2d 467 at 469, that "the deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand."

The grand jury testimony, salted as it was with leading and suggestive questions, and even containing highly questionable admonitions to various of the witnesses, was even more unsatisfactory. The burden of proving its case by a preponderance of the credible evidence rests upon the plaintiff. We are not

satisfied that plaintiff carried any of that burden by directing our attention to isolated portions of transcribed testimony given by witnesses who testified in a criminal trial involving issues different from the issues presented in this case, or to testimony by way of pretrial deposition, or to testimony given before one of the three grand juries empanelled by the government in this case.

Much of the testimony was not subject to any cross-examination; some of it was obviously based upon hearsay and rumor. We find and conclude that even if the criminal trial testimony, the deposition testimony and the grand jury testimony is considered as free from objection, such testimony, when considered in light of all the other testimony and evidence in the case was not of sufficient weight to warrant a finding that plaintiff had successfully carried the burden of proof in regard to the allegations of the amended complaint. We add that we have in the same manner considered the testimony which defendant contends is incompetent under the Missouri Dead Man's Act and have reached the same conclusion in regard to that testimony. It is our express finding and conclusion that even if it is assumed that all of the questioned testimony were admissible in evidence, it is simply insufficient to persuade the finder of facts that plaintiff has sustained the burden of proving its case.

Paragraph 17 of our findings of fact reflects our view of the evidence adduced by plaintiff to support

its price-fixing claim. Plaintiff did introduce some evidence that prices were discussed by various of defendant's employees with various employees or owners of other LP gas companies. But proof of those conversations did not prove the existence of price-fixing agreements. The record reasonably establishes that none of defendant's employees who talked about prices had any real or apparent authority in regard to setting the retail prices at which any of defendant's subsidiaries sold LP gas. There simply was no evidence in this case that defendant in any way deviated from the procedures established in its Operational Policy Manual (Pl.Coll.Ex.7, p. 11) which stated at page 73 that: "The retail prices and retail pricing policies are the direct and absolute responsibility of the Director of Retail pricing, located in the home office * * *. All price changes or deviations must be approved by the Director in advance."

Paragraphs 18 and 20 relate to defendant's covenants not to compete and the lawsuits brought to enforce those covenants. Covenants not to compete have a long juridical history. There are, of course, cases in which a particular court, in its discussion of all the facts and circumstances involved in a particular antitrust case, has taken note of the fact that a particular defendant did in fact have an established practice in regard to covenants not to compete. But we know of no case which even intimates that inclusion of such a covenant in a defendant's

employment contracts, standing alone, constitutes a violation of the antitrust laws.

Plaintiff's evidence can be said to establish that the defendant did in fact have a large number of employee contracts which did in fact contain covenants not to compete. But that evidence falls far short of establishing that the contracts were unreasonable restraints of trade or that they constituted a violation of an antitrust law. See Blake, "Employee Agreements Not To Compete," 73 Harv.L. Rev. 625 (1960), and cases discussed therein.

Plaintiff's evidence in regard to the covenants not to compete as contained in some of defendant's acquisition contracts was similarly deficient. It has long been settled that covenants not to compete which are ancillary to the sale of business assets do not violate antitrust laws so long as they are no broader than necessary regarding time, territory, and product line. See United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) and Goldberg v. Tri-States Theatre Corp., 126 F.2d 26 (8th Cir. 1942). Courts have generally permitted even wider latitude in the scope of non-competition agreements ancillary to the sale of a business or business assets than to such covenants in employment agreements. Mouldings, Inc. v. Potter, 315 F.Supp. 704 (M.D.Ga.1970); Day Companies v. Patat, 403 F.2d 792 (5th Cir. 1968) and Von Kalinowski, Antitrust and Trade Regulations, § 1.03[4][i].

Plaintiff, in effect, asks this Court to find a "plan or scheme" by defendant to monopolize the LP gas

industry from the mere existence and number of covenants not to compete procured by defendant from its employees or ancillary to its asset purchases. The general language relied upon by plaintiff as contained in United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911); Schine Chain Theatres, Inc. v. United States, *supra*; and Marnell v. United States Parcel Serv. of America, Inc., 1971 Trade Cases, ¶ 73,761 (N.D.Cal.1971) does not support plaintiff's proposed findings or proposed conclusions of law. *American Tobacco* stands only for the proposition that covenants not to compete may be a device used to extend a pre-existing monopoly. *Schine Chain Theatres* also involved only the extension of a pre-existing monopoly. *Marnell*, like *Schine* and *American Tobacco*, stands only for the proposition that covenants not to compete can be a factor in inferring an intent to extend a pre-existing monopoly. This Court cannot properly infer a plan to monopolize solely from defendant's total number of covenants not to compete and that is about all plaintiff's evidence amounted to.

Plaintiff did, of course, introduce some evidence that defendant has engaged in litigation with various "competitors" and former employees, primarily over covenants not to compete in purchase and employment agreements. Those lawsuits, however, were based upon written contracts which were not *per se* illegal and unenforceable. United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed. 2d 626 (1965) and Eastern Railroads Presidents Con-

ference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), together with the more recent cases of California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) and Otter Tail Power Company v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), all require a factual finding that litigation against competitors must be a "mere sham" before such litigation may be found to be violative of the antitrust laws.

Application of the standards articulated in *Noerr*, *Pennington*, *Trucking Unlimited*, and *Otter Tail Power Company* and those stated in analogous cases involving the enforcement of fraudulently procured patents, see, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 84 S.C. 347, 15 L.Ed.2d 247 (1965), and its progeny, require and support our findings in regard to the covenants not to compete and our finding that plaintiff failed to show that defendant in fact engaged in "vexatious" or sham" litigation in regard thereto.

Paragraph 19 of our findings related to plaintiff's failure to prove that defendant had in fact engaged in unlawful reciprocal purchasing agreements. Plaintiff's effort to prove that defendant had an illegal reciprocal purchasing policy was based primarily on defendant's use of the term "reciprocal sales" in its Operating Policy Manual (Pl. Coll. Ex. 7, p. 11). The testimony of the single witness called to testify on this subject is not relied upon in support of any of plaintiff's proposed findings or proposed conclu-

sions. We need simply state that nothing said in the leading cases of FTC v. Consolidated Foods Corp., 380 U.S. 592, 85 S.Ct. 1220, 14 L.Ed.2d 95 (1965), and United States v. General Dynamics Corp., 258 F.Supp. 36 (S.D.N.Y.1966) support plaintiff's contention in regard to its reciprocal purchasing claim. In *General Dynamics*, for example, the trial court made it clear that "bilateral arrangements" or agreements were necessary for reciprocal purchasing to violate Section 1 of the Sherman Act.

It is therefore apparent that evidence that the defendant may have made purchases from its customers, without more, does not constitute proof of a violation of the Sherman Act. Plaintiff is required to show: (1) that a *quid pro quo* was demanded or understood to be an integral part of the reciprocal purchases, see, e.g., Stavrides v. Mellon National Bank & Trust Co., 353 F.Supp. 1072 (W.D.Pa.1973); and (2) that a "not insubstantial" amount of trade in a line of commerce was restrained. See, e.g., International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); United States v. General Dynamics Corporation, 258 F.Supp. 36 (S.D.N.Y.1966). At a bare minimum there must be some form of understanding between seller and buyer to reciprocate. A bilateral understanding is the *sine qua non* of Section 1 of the Sherman Act. It is clear that plaintiff did not even attempt to offer evidence sufficient to prove the allegation of its amended complaint in regard to reciprocal purchasing and that this Court could not make any other finding than

that made in paragraph 19 of our findings of fact.

Application of the principles of law stated in our conclusions of law to the facts as we have found them, as both have been amplified in part IV of this memorandum opinion, requires that final judgment be entered for the defendant. Accordingly, it is

Ordered that the Clerk enter an appropriate final judgment in favor of the defendant, together with its costs.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

[Filed May 28, 1976, Robert C. Tucker, Clerk]

No. 75-1492

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPIRE GAS CORPORATION, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 28, 1976

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

[Filed Jun. 30, 1976, Robert C. Tucker, Clerk]

No. 75-1492

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPIRE GAS CORPORATION, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 30, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE; 1976 223947 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted] 76-726

UNITED STATES OF AMERICA,
Petitioner,

vs.

EMPIRE GAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-276

UNITED STATES OF AMERICA,
Petitioner,

vs.

EMPIRE GAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether, in an "attempt to monopolize" civil case under Section 2 of the Sherman Act, the government is required to prove that defendant had not only a specific intent to monopolize, but also a dangerous probability of success in monopolizing a relevant product and geographic market.

STATEMENT

A. Nature and Chronology of the Case

Respondent Empire Gas Corporation ("Empire") is a corporation organized in 1963 under the laws of the State of Missouri,

with its principal place of business in Lebanon, Missouri. (App. B, p. 32a).[1] Empire, through and in conjunction with its wholly-owned subsidiaries, is and has been principally engaged in the wholesale and retail sale of liquefied petroleum gas ("LP gas") in various states. (App. B, p. 33a). LP gas includes various gases of the methane series, principally propane and butane, which have been compressed into a liquid state. (App. B, p. 33a).

This petition stems from protracted litigation which began in early 1969 with an inquiry by the Department of Justice, followed by at least three federal grand jury investigations. (Gov. Coll. Ex. 7). On August 14, 1972 (one day before the term of the last grand jury expired), petitioner filed a civil Complaint charging Empire with violating Section 2 of the Sherman Act by attempting to monopolize the distribution and retail sale of LP gas in what petitioner later identified as 23 "local marketing areas" in Missouri and other states. More specifically, petitioner alleged that Empire had attempted to monopolize by its acquisitions, customer and territory allocations, below cost pricing, threats, price fixing, agreements not to compete and reciprocal deals. (Complaint, pp. 4-6).

On April 24, 1973, petitioner filed a motion in which it stated:

> "The Government may be required to demonstrate a specific intent . . . to monopolize a particular market as well as a dangerous probability of achieving a monopoly if the conduct undertaken were successful. Such proof will require selection of a geographic market within which such proof can be shown." (Gov. Motion, Apr. 24, 1973, p. 3).

At a pretrial conference on May 30, 1973, the Ninth Circuit's decision in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir.

1. Parts of the record found in the Joint Appendix filed in the Court of Appeals are cited as "J. A." The Petition and its Appendix are cited as "Pet." and "App.", respectively. All other citations are in accordance with Rule 40(2).

1964) was discussed, and petitioner's lead counsel declared that he was "going to attempt to meet" the burden of proving dangerous probability in relevant markets under the Eighth Circuit's decision in *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F. 2d 269 (8th Cir. 1973). (J. A. 2783a-2784a).

Petitioner then declared that its Complaint "sounds more in Section I than in Section II" (J. A. 2796a), and an Amended Complaint was filed on June 22, 1973, charging violations of both sections. The Amended Complaint merely supplemented the first filing by inserting a short paragraph regarding unnamed co-conspirators, and by adding a few lines to the introductory language in the two "charging" paragraphs. (J. A. 10a-18a).

Another pretrial conference was held on June 22, 1973. Petitioner's counsel reiterated the earlier decision "to undertake to meet the evidentiary standard required by the Eighth Circuit in *Agrashell*. . . ." and announced petitioner's intent to take a "survey." (J. A. 2798a-2799a). In response to questions from the court regarding that survey and proof of market shares, one of petitioner's attorneys stated:

> "It is our intention; we think we are going to have to put them [market shares] in, so we need additional evidence." (J. A. 2810a).

Petitioner's lead counsel also opined:

> "I think that you could—you could have a person with one percent of the market, if they had enough muscle they could threaten to take over the market and continue, if it was apparent that they had the ability and intention to do so, I think you could call that an attempt to monopolize." (J. A. 2814a).

On July 11, 1973, petitioner proposed a pretrial order which included the following subparagraph regarding its survey questionnaire:

> "5. For the purpose of assembling LP gas market share data . . .:
>
> * * *

"(c) No later than September 10, 1973, the plaintiff shall present said questionnaire to the Court for an order permitting said questionnaire to be sent to the defendant and defendant's competitors pursuant to subpoena." (Gov. Prop. Order, July 11, 1973, pp. 1-2).

Petitioner's suggestions in support of that proposed pretrial order declared that "[i]t is essential in these cases to select commercially realistic markets and then survey the competitors selling in those markets by questionnaire." (Gov. Supp. Sugg., July 11, 1973, p. 4). The court's "PRETRIAL ORDER NO. 1," entered July 17, 1973, included verbatim petitioner's proposed subparagraph regarding submission of the survey questionnaire to the court. (Order, July 17, 1973, pp. 1-2).

Another pretrial conference was held on November 19, 1973. Again in response to a question from the court, petitioner's counsel declared that a decision had been made to reduce the number of petitioner's alleged "market areas" from 23 to 13 (J. A. 34a), and that the survey questionnaire had been mailed on November 14 to selected LP gas companies in the 13 areas. (J. A. 29a-30a). Petitioner had therefore unilaterally decided to completely ignore the court's order regarding the survey. It did not present the questionnaire to the court, did not seek or obtain a court order permitting the questionnaire to be sent out, and did not utilize the court's subpoena power to increase the likelihood of obtaining prompt and accurate responses. Petitioner's counsel simply observed:

"[I]f the survey results come in as the defendants contend, showing that their market shares are not substantial, then we will be faced with the decision of urging, nonetheless, despite the fact that their market shares are not great, there are other ways you can violate Section 2."[2] (J. A. 65a).

2. The Eighth Circuit's decision in *Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237 (8th Cir. 1973) was also discussed at this pretrial conference. The Court of Appeals in *Acme* reaffirmed its decision in *Agrashell* and rejected the implications of *Lessig*.

B. Decisions Below

1. Trial Court

The trial court filed its decision on May 6, 1975. Precise and detailed findings of facts and conclusions of law were entered for each and every allegation in the Amended Complaint. None of petitioner's proffered evidence was excluded, and all findings were made "on the merits in regard to what . . . was established by the weight of the credible evidence." (App. B, p. 32a).

Briefly stated, the trial court found for Empire on all issues. With regard to the requirement of dangerous probability of success, the trial court specifically found:

"[T]he undisputed data in evidence tends to establish that during the relevant time period Empire's annual retail sales of LP gas have declined, both in terms of gallons sold and dollars received, in each of plaintiff's alleged market areas, and that during the same time period Empire's 'market share' has declined in each of the alleged market areas. Other LP gas companies experienced no difficulties in entering each of the alleged market areas and many of the new entrants experienced steadily increasing retail sales and profits. Particular established LP gas companies in each of the alleged thirteen market areas had increasing retail sales, profits, and 'market shares.'" (App. B, p. 35a; *accord*, App. B, pp. 41a, 44a-45a).

The trial court also found that the uncontradicted evidence established that "intense competition generally existed at all relevant times throughout the LP gas industry and, in particular, in each of plaintiff's thirteen alleged market areas." (App. B, p. 40a).

2. Court of Appeals

Petitioner appealed to the Court of Appeals for the Eighth Circuit, but only with regard to the trial court's decisions on the Section 2 issue and on the validity of the agreements not to

compete under Section 1. (App. A, p. 2a, n. 1). The Section 2 issue was then narrowed by petitioner during oral argument to only two alleged "market areas," Lebanon and Wheaton. (App. A, p. 2a).

Citing *Agrashell,* the Court of Appeals began its decision with the proposition that "the government was required to show Empire's specific intent to monopolize and a dangerous probability of success within a relevant product and geographic market." (App. A, p. 3a). The court first found that the trial court was clearly erroneous in its findings regarding specific intent and relevant product market.[3] (App. A, pp. 10a, 14a). It then expressed substantial "misgivings about the government's method, or lack of method, of designating Wheaton and Lebanon as relevant geographic markets or submarkets." (App. A, p. 19a). Noting that the Lebanon area overlapped with another designated area, the Court of Appeals stated:

> "No reasons were given for acceptance or rejection of any of the areas, nor were the criteria used in selecting areas entered into evidence, despite repeated requests therefor by the judge. In fact, the government was unable to say who had drawn any of the lines which delineated its 13 areas." (App. A, p. 18a).

Despite such "misgivings" and a suggestion that possibly "Empire should be considered as competing within a national market area" (App. A, p. 19a), the court accepted the Lebanon and Wheaton geographic markets "for purposes of this appeal in view of the result we reach on the question of dangerous probability of success." (App. A, pp. 19a-20a).

3. Respondent submits that the Court of Appeals erred in so finding under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 52(a)). The trial court's findings, based upon both the weight of the evidence and the credibility of the witnesses, are supported by the record. The trial court had the opportunity to view the witnesses and examine all the documents, and its findings on specific intent and relevant product market are based upon a more exhaustive review of the record and post-trial filings. *See United States* v. *Yellow Cab Co.,* 338 U. S. 338 (1949).

The Court of Appeals' consideration of the dangerous probability requirement is quite lengthy (App. A, pp. 20a-25a). In affirming the trial court on this question, it found:

> "The record shows that the LP gas business is highly competitive in the Lebanon and Wheaton markets as elsewhere. The defendant has many competitors wherever it does business, and new ones spring up frequently. The barriers to entry in this industry are minimal; all that one needed are a supply of LP, a truck, and perhaps a storage tank." (App. A, p. 20a).

Additionally, the Court of Appeals was unable to discover even one instance where any activity of Empire caused any competitor in Lebanon and Wheaton to raise or fix a price, stop soliciting Empire's customers, or decide not to enter the LP gas business. (App. A, p. 21a). It concluded:

> "Taking the evidence of dangerous probability of success as a whole . . ., we cannot find the requisite proof." (App. A, p. 25a).[4]

ARGUMENT

Introduction

The essence of petitioner's present "theory" is contained in pages 12 and 13 of its Petition. In petitioner's view, "two situations must be distinguished" in considering Section 2 attempts to monopolize. (Pet. 12). "When a defendant's conduct is not obviously anti-competitive . . . it is necessary to undertake a careful examination of the effect on the market conditions in which it takes place." (*Id.*) A court considering such conduct must therefore "examine the structure of the market involved, the defendant's actual market power, and the likelihood of its attaining a monopoly." (*Id.* at 12-13). "On the other hand, where the defendant's conduct has no redeeming competitive *virtue,*"

4. The Court of Appeals was highly critical of petitioner's "survey" and "expert testimony". (App. A, pp. 20a-22a). It also noted that many of petitioner's exhibits were unpersuasive or infected with errors. (App. A, pp. 22a-25a).

(emphasis added) or it is "socially undesirable," then "there is no need for courts to engage in refined analysis. . . ." (*Id.* at 13). In the latter situation, defendant's conduct "should be forbidden without regard to its actual effect upon competition in a particular case." (*Id.*) "[N]o additional economic analysis is necessary." (*Id.*)

In an effort to put the above theory into legally recognizable terms, petitioner contends that in a Section 2 attempt to monopolize case, courts should not require "independent proof of a dangerous probability that monopolization will be attained." (Pet. 2). Petitioner thereby purports to espouse the so-called "*Lessig* rule," which rule also rejects the need to prove a relevant product and geographic market. (*See Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964)).

1. The 94th Congress Recently Rejected Petitioner's Position

Both Houses of Congress conducted an extensive examination of the antitrust laws during the 94th Congress. (*See* H. R. Rep. No. 499, 94th Cong., 2d Sess. (1976); H. R. Rep. No. 1343, 94th Cong., 2d Sess. (1976); H. R. Rep. No. 1373, 94th Cong., 2d Sess. (1976); S. Rep. No. 83, 94th Cong., 2d Sess. (1976)). As a result of that examination, comprehensive bills were introduced in both Houses—Senate Bill 1284 and House Bills 8532, 13489, and 14850. Senate Bill 1284, called the Hart-Scott Anti-Trust Bill, included the following Section:

> "Sec. 704. Section 2 of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890 (15 U.S.C. 2), as amended, is amended by inserting at the end thereof the following new sentence: 'In any proceeding or action brought under this section alleging an attempt or conspiracy to monopolize, proof of a relevant market or of a dangerous probability of success in monopolizing any part of interstate or foreign commerce shall not be required.'" (S. 1284, *as amended*, 94th Cong., 1st Sess. § 704 (Comm. Print, 1975)).

After almost a year of careful committee consideration (*see Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Committee on the Judiciary, United States' Senate*, 94th Cong., 1st and 2d Sess., pts. 1-3 (1975-76)), during which strong opposition to Section 704 was expressed (*see, e.g., id.*, at pt. 3, 201-03 (1976)), the Senate Judiciary Committee struck Section 704 from the bill it reported to the full Senate. (S. Rep. No. 83, 94th Cong., 2d Sess. (1976)). Moreover, House Bill 8532, which was finally passed by the Senate as a substitute for the Senate bill, did not include an amendment to Section 2 of the Sherman Act. *See* 90 Stats. 1383.

Thus the fact is that Congress has carefully considered, and decidedly rejected, a clear opportunity to conform the requirements of a Section 2 attempt case to petitioner's specifications. Petitioner now asks the Court to legislate in its behalf.

2. The Court Has Rejected Petitioner's Position

Petitioner claims that this Court's "pronouncements are ambiguous" regarding the need to show dangerous probability of success in a relevant market (Pet. 15). Respondent and a large number of authorities disagree.

The term "dangerous probability" was first used by this Court regarding a Section 2 attempt to monopolize in *Swift & Co.* v. *United States*, 196 U. S. 375 (1905):

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. [citation omitted] But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.
>
> * * *
>
> Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is

a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. [citation omitted]" (196 U. S. at 396, 402).

Swift, of course, has been cited and quoted time and time again by courts in rejecting *Lessig*. (*See e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (1st Cir. 1974); *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F. 2d 269, 284, 287 (8th Cir. 1973); *V. & L. Cicione, Inc.* v. *C. Schmidt & Sons, Inc.*, 403 F. Supp. 643, 651, 652, n. 11 (E. D. Penn. 1975)).

Equally cited and quoted[5] regarding the dangerous probability requirement is *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946). In *American Tobacco* this Court approved a trial court instruction which included the following definition under Section 2:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. . . ." (328 U. S. at 785).

Curiously, petitioner neglects to mention *American Tobacco*.

A third decision, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965), is considered by many to be dispositive, since it was decided after *Lessig*. (*See, e.g., Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 285, 287 (8th Cir. 1973); 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-11 n. 32 (1976)). Specifically noting that "[t]he trial court has not analyzed any economic data," this Court in *Walker Process* reversed that lower court and held:

5. *See, e.g., Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969); *Sulmeyer* v. *Coca Cola Co.*, 515 F. 2d 835, 850 (5th Cir. 1975); *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 663 (8th Cir. 1957); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 285 (8th Cir. 1973); *Bowen* v. *New York News, Inc.*, 366 F. Supp. 651, 673 (S. D. N. Y. 1973).

> "To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition." (382 U. S. at 177).

Such language is directly contrary to petitioner's position that no regard should be given to "actual effect upon competition." (Pet. 13). *See Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 286 (8th Cir. 1973); *United States* v. *International Business Machs. Corp.*, 66 F. R. D. 180, 184 (S. D. N. Y. 1974).

3. There Is No "Conflict Among the Circuits"

Petitioner asserts that there is a "conflict among the circuits" regarding this question. (Pet. 7). A careful analysis of all the circuits indicates otherwise.

a. *Eighth Circuit*

The Court of Appeals held:

> "In order to establish an 'attempt to monopolize *** any part of the trade or commerce among the several States ***' under 15 U.S.C. § 2, the government was required to show Empire's specific intent to monopolize and a dangerous probability of success within a relevant product and geographic market." (App. A, p. 3a).

This holding comports with a long line of Eighth Circuit decisions. (*See, e.g., Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 663 (8th Cir.), *rehearing denied, cert. denied*, 354 U. S. 923 (1957); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 971, 974 (8th Cir. 1968), *cert. denied*, 395 U. S. 961 (1969); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 286 *et seq.* (8th Cir.), *rehearing denied, cert. denied*, 414 U. S. 1032 (1973); *Acme Precision Prods., Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237, 1240 *et seq.* (8th Cir. 1973), *rehearing*

denied; Morning Pioneer, Inc. v. *Bismarck Tribune Co.*, 493 F. 2d 383, 386 (8th Cir.), *cert. denied*, 419 U. S. 836 (1974); *Morton Bldgs. of Nebraska, Inc.* v. *Morton Bldgs., Inc.*, 531 F. 2d 910, 919 (8th Cir. 1976)).

b. *Ninth Circuit*

Petitioner claims that the holding here "conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, *certiorari denied*, 377 U. S. 993. . . ." (Pet. 7). Respondent agrees that there is language in *Lessig* which apparently disagrees with the holding here. Respondent notes, however: (1) that this appeal was decided after the Court's decision in *Walker Process*, while *Lessig* was decided before; (2) that the discussion in *Lessig* regarding this question was *dicta*[6] (*see* 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-11, n. 30); (3) that the *Lessig* court stated on rehearing that the part of its opinion which discussed this question "is to be read with the remainder, and in light of the anti-competitive purposes and conduct to which the case relates." (327 F. 2d at 478; *see Diamond Int'l Corp.* v. *Walterhoefer*, 289 F. Supp. 550, 575-76 (D. Md. 1968)); and (4) that the *Lessig* court did not distinguish between attempt and conspiracy cases under

6. The cases specifically discussing and rejecting *Lessig's dicta* are legion. *See, e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U. S. 1004 (1975); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F. 2d 1338, 1348, n.17 (3rd Cir. 1975); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 287 (8th Cir.), *rehearing denied, cert. denied*, 414 U. S. 1032 (1973); *Acme Precision Prods., Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237, 1240 (8th Cir. 1973), *rehearing denied; Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F. Supp. 263, 269 (D. D. C. 1976); *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 737, 738 (E. D. N. Y. 1965); *Radzik* v. *Chicagoland Recreational Vehicle Dealers, Ass'n*, 1972 Trade Cas. ¶ 74,167 (N. D. Ill. 1972); *Tire Sales Corp.* v. *Cities Service Oil Co.*, 410 F. Supp. 1222, 1230-31, n.11 (N. D. Ill. 1976); *Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625, 637 (D. Kan. 1965).

Section 2.[7] (*See* 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-13, n. 33).

Petitioner then goes a step farther and claims that the Ninth Circuit agrees with its position, and that petitioner "would have prevailed in this case under the rule the Ninth Circuit follows." (Pet. 8). Assuming *arguendo* that petitioner's position accords with *Lessig's dicta*, a careful examination of Ninth Circuit decisions since *Lessig* indicates that there is serious question whether the Ninth Circuit has a "rule," and whether *Lessig's dicta* has been followed. (*Compare, Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F. 2d 449 (9th Cir. 1966), *rehearing denied, cert. denied*, 387 U. S. 932 (1967); *Jerrold Electronics Corp.* v. *Wescoast Broadcasting Co.*, 341 F. 2d 653 (9th Cir.), *rehearing denied, cert. denied*, 382 U. S. 817 (1965); *Walker Distrib. Co.* v. *Lucky Lager Brewing Co.*, 323 F. 2d 1 (9th Cir. 1963); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F. 2d 656 (9th Cir.), *cert. denied*, 375 U. S. 922 (1963); *with, Hallmark Indus.* v. *Reynolds Metals Co.*, 489 F. 2d 8 (9th Cir. 1973), *rehearing denied, cert. denied*, 417 U. S. 932 (1974)). One commentator aptly concluded:

> "[T]he *Lessig* opinion has had a remarkably checkered career even in the Ninth Circuit. It is surrounded by attempt decisions, shortly before and shortly after, in which

7. The following is a typical criticism of *Lessig's dicta*:

> "The obvious flaw in the proposition put forth . . . by the dicta in *Lessig* . . ., apart from the fact that it ignores the traditional criminal law antecedents of the crime of attempt—is that it could make of every business tort an attempt to monopolize. If 'dangerous probability' of achieving monopoly power in some particular market is not a necessary element of the crime of attempted monopolization, then the only element must be the intent to monopolize. And the intent to monopolize, of course, could conceivably be inferred from virtually any hostile or even vigorous business activity. As Professor Smith observed even before the appearance on the scene of the *Lessig* dicta, the elimination of the element of 'dangerous probability' and of the relevant market from the crime of attempted monopolization would leave virtually no perimeters on the prohibitions of Section 2 of the Sherman Act." (2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-11, n.32).

> the relevant inquiry is made without any reference to the treatment of the issue in *Lessig*. Other opinions have undertaken to explain the *Lessig* doctrines, either defensively or critically. At least one opinion was initially published with an open question of the validity of *Lessig;* the reference mysteriously disappeared by the time of permanent publication in the *Federal Reporter*." (Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Mich. L. Rev. 375, 420 (1974) (Footnotes omitted).

Recent decisions have likewise observed that *Lessig* "has had a shakey history in the Ninth Circuit" (*Tire Sales Corp.* v. *Cities Service Oil Co.,* 410 F. Supp. 1222, 1230-31 (N. D. Ill. 1976)), and that its present status there is "subject to some uncertainty." (*George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 508 F. 2d 547, 550 (1st Cir. 1974), *cert. denied,* 421 U. S. 1004 (1975); *accord, E. J. Delaney Corp.* v. *Bonne Bell, Inc.,* 525 F. 2d 296, 305 (10th Cir. 1975), *cert. denied,* 425 U. S. 906 (1976); 2 Von Kalinowski, *Antitrust Laws and Trade Regulation,* § 9.01[2], p. 9-12, n. 32).

c. *Seventh Circuit*

Petitioner also claims that it "would have prevailed under the rule in the Seventh Circuit," citing *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.,* 452 F. 2d 579, 598 (7th Cir. 1971), *rehearing denied, cert. denied,* 405 U. S. 1066 (1972). This claim is pure nonsense.

Kearney clearly applied the "dangerous probability" test "in the relevant market"[8] (452 F. 2d at 598-99), and it has been frequently cited by courts as rejecting *Lessig's dicta.* (*See, e.g., E. J. Delaney Corp.* v. *Bonne Bell, Inc.,* 525 F. 2d 296, 305 (10th Cir. 1975), *cert. denied,* 425 U. S. 906 (1976); *Radzik* v. *Chicagoland Recreational Vehicle Dealers, Assn.,* 1972 Trade Cas. ¶ 74,167 (N. D. Ill. 1972); *Holleb & Co.* v. *Produce Terminal Cold Storage Co.,* 532 F. 2d 29, 33 (7th Cir. 1976), *rehearing denied*). Moreover, decisions before[9] and after[10] *Kearney* indicate that the Seventh Circuit applies the same standard as was applied here.[11] Justice Stevens, who wrote the *Kearney* opinion, later wrote in *Mullis* v. *Arco Petroleum Corp.,* 502 F. 2d 290 (7th Cir. 1974):

> "Whether a complaint alleges monopolization or an attempt to monopolize, it is incumbent upon the plaintiff to define the relevant market in which the defendant's actions are to be appraised. Since the statute has 'both a geographical and distributive significance' [citation omitted], the market definition must include a description of both the territory encompassed and the product involved.
>
> * * *
>
> There is no evidence that its [defendant's] share is growing, and certainly no bases for inferring any dangerous probability that it would ever approach monopoly proportions." (502 F. 2d at 295, 297).

8. The court in *Kearney* repeatedly used the term "relevant market" and twice noted that the parties had stipulated regarding the relevant product market. (452 F. 2d at 581, 597-99).

d. *First, Fourth, Fifth and Tenth Circuits*

Petitioner concedes that the First, Fourth, Fifth and Tenth Circuits agree with the Eighth Circuit regarding this question, citing a total of five decisions (*George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 508 F. 2d 547 (1st Cir. 1974),

9. *See, e.g., Bernard Foods Indus., Inc.* v. *Dietene Co.,* 415 F. 2d 1279, 1284 (7th Cir. 1969), *rehearing en banc denied, cert. denied,* 397 U. S. 912 (1970).

10. *Bendix Corp.* v. *Balax, Inc.,* 471 F. 2d 149, 161-62 (7th Cir. 1972), *rehearing and rehearing en banc denied, cert. denied,* 414 U. S. 819 (1973); *Mullis* v. *Arco Petroleum Corp.,* 502 F. 2d 290, 295, 297 (7th Cir. 1974); *Radzik* v. *Chicagoland Recreational Vehicle Dealers, Ass'n,* 1972 Trade Cas. ¶ 74,167 (N. D. Ill. 1972); *Tire Sales Corp.* v. *Cities Service Oil Co.,* 410 F. Supp. 1222, 1231 (N. D. Ill. 1976); *Holleb & Co.* v. *Produce Terminal Cold Storage Co.,* 532 F. 2d 29, 33 (7th Cir. 1976), *rehearing denied.*

11. The court in *Tire Sales Corp.* v. *Cities Service Oil Co.,* 410 F. Supp. 1222 (N. D. Ill. 1976) rejected *Lessig's dicta* and stated: "It is settled in this Circuit and others that the definition of relevant market is an essential element of an action alleging attempt to monopolize." (410 F. Supp. at 1231).

cert. denied, 421 U. S. 1004 (1975); *McElhenney Co.* v. *Western Auto Supply Co.,* 269 F. 2d 332 (4th Cir. 1959); *Cliff Food Stores, Inc.* v. *Kroger, Inc.,* 417 F. 2d 203 (5th Cir. 1969); *Yoder Bros.* v. *California-Florida Plant Corp.,* 537 F. 2d 1347 (5th Cir. 1976), *petition for cert. filed,* 45 U. S. L. W. 3432 (U. S. Dec. 14, 1976) (No. 76-766); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.,* 525 F. 2d 296 (10th Cir. 1975), *cert. denied,* 425 U. S. 906 (1976)). Respondent simply adds that petitioner's list of citations is hardly exhaustive. (*See, e.g., Advance Business Sys. And Supply Co.* v. *SCM Corp.,* 415 F. 2d 55 (4th Cir. 1969), *cert. denied,* 397 U. S. 920 (1970); *Diamond Int'l Corp.* v. *Walterhoefer,* 289 F. Supp. 550 (D. Md. 1968); *Sulmeyer* v. *Coca Cola Co.,* 515 F. 2d 835 (5th Cir. 1975), *rehearing and rehearing en banc denied, cert. denied,* 424 U. S. 934 (1976); *Scranton Const. Co.* v. *Litton Indus. Leasing Corp.,* 494 F. 2d 778 (5th Cir. 1974), *rehearing and rehearing en banc denied, cert. denied,* 419 U. S. 1105 (1975); *Panotex Pipe Line Co.* v. *Phillips Petroleum Co.,* 457 F. 2d 1279 (5th Cir.), *cert. denied,* 409 U. S. 845 (1972)).

e. *All other circuits*

Petitioner is silent regarding all other circuits, leaving the impression that they have not considered the question. Yet the courts in these remaining circuits agree with the Eighth Circuit's holding in this case. (*See, e.g., Periodical Distribs., Inc.* v. *American News Co.,* 416 F. 2d 1330 (2d Cir. 1969), *aff'g,* 290 F. Supp. 896 (S. D. N. Y. 1968); *United States* v. *Chas. Pfizer & Co.,* 245 F. Supp. 737 (E. D. N. Y. 1965); *Bowen* v. *New York News, Inc.,* 366 F. Supp. 651 (S. D. N. Y. 1973); *United States* v. *International Business Machs. Corp.,* 66 F. R. D. 180 (S. D. N. Y. 1974); *Rea* v. *Ford Motor Co.,* 497 F. 2d 577 (3rd Cir.), *cert. denied,* 419 U. S. 868 (1974); *Coleman Motor Co.* v. *Chrysler Corp.,* 525 F. 2d 1338 (3rd Cir. 1975); *V. & L. Cicione, Inc.* v. *C. Schmidt & Sons, Inc.,* 403 F. Supp. 643 (E. D. Penn. 1975); *Alles Corp.* v. *Senco Prods. Inc.,* 329

F. 2d 567 (6th Cir. 1964); *Zenith Vinyl Fabrics Corp.* v. *Ford Motor Co.,* 357 F. Supp. 133 (E. D. Mich. 1973); *Oak Distrib. Co.* v. *Miller Brewing Co.,* 370 F. Supp. 889 (E. D. Mich. 1973); *Merit Motors, Inc.* v. *Chrysler Corp.,* 417 F. Supp. 263 (D. D. C. 1976)).

f. *Conclusion*

If any conflict still exists after this Court's decision in *Walker Process,* 382 U. S. 172 (1965), it is not "among the circuits," (Pet. 7), but rather within the Ninth Circuit.

4. Petitioner's Position Dehors the Record

Although disclaiming any need for economic analysis or for consideration of competitive effect in a situation where a defendant's conduct is "socially undesirable" (Pet. 13), petitioner nonetheless declares that such conduct "should be forbidden" because it "*may* induce competitors to be less competitive" and "it certainly increases the chance that monopolization eventually will occur. . . ." (Pet. 11-12). (Emphasis added) The initial problem with such a declaration is that it bears no relationship whatsoever to the record in this case.[12] Both the trial and appellate courts found that the *undisputed* evidence established: (1) respondent's retail sales and market share declined in each of petitioner's alleged market areas during the relevant time period (App. B, p. 35a; *accord, United States* v. *Columbia Steel Co.,* 334 U. S. 495, 533 (1948); *Mullis* v. *Arco Petroleum Corp.,*

12. *See United States* v. *United States Steel Corp.,* 251 U. S. 417, 452 (1920) ("whatever there was of wrongful intent could not be executed.")

One commentator has suggested:

> "In short, the conclusion that the forbidden specific intent has been shown is often no more than an illustration of the common legal tendency to camouflage an uncertain evaluation of circumstances in epithetical words of improper motivation."

(Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Mich. L. Rev. 375, 398 (1974)).

502 F. 2d 290, 297 (7th Cir. 1974)); (2) ease of entry into the LP gas retail business (App. A, p. 20a; App. B, pp.35a, 41a, 45a; *accord, Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347, 1368-69 (5th Cir. 1976)); (3) new and successful entrants into each alleged market area (App. B, pp. 35a, 41a, 44a-45a; *accord, Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625, 638 (D. Kan. 1965)); (4) many competitors in each alleged market area, including substantial national companies (App. A, p. 20a; *see* Gov. Ex. 115; *accord, United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 403 (1956); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969); *Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625, 638 (D. Kan. 1965)); (5) intense competition in the industry and particularly in each of the alleged market areas (App. A, p. 20a; App. B, p. 40a; *accord, Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347, 1369 (5th Cir. 1976); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969)); and (6) that established competitors in each alleged market area had increasing retail sales, profits and market shares (App. B, p. 35a; *accord, United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 403 (1956); *Bendix Corp.* v. *Balax, Inc.*, 471 F. 2d 149, 164 (7th Cir. 1972)). Given such uncontradicted evidence, the result is clear under any theory of attempt to monopolize.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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January, 1977.

No. 76-726

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

EMPIRE GAS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondent contends that Congress has considered and rejected the position taken in our petition. Respondent relies for this proposition on the action of the Senate Judiciary Committee in striking a proposed Section 704 from S. 1284, the Hart-Scott Antitrust Bill. That contention is unfounded.

The proposed Section 704 (see Br. in Opp. 8) was substantially different from the standard we have proposed. Section 704 would have provided that "proof of a relevant market or of a dangerous probability of success in monopolizing any part of" commerce is irrelevant. That rule would have precluded consideration of the likelihood of monopolization in every attempt-to-monopolize the case, including cases in which the defendant's conduct is too ambiguous to justify a conclusion that the conduct is anticompetitive without an examination of the probable

effects of the defendant's actions in a particular market. The Department of Justice has never advocated an approach that failed to make this distinction; the Department did not support proposed Section 704 in the Hart-Scott Antitrust Bill.

Moreover, the Judiciary Committee's failure to include particular language in a particular bill does not justify any inference with respect to the views of the 94th Congress on the subject of attempt to monopolize; the proposal was stricken before the bill reached the floor.[1] Nor does the action of the Senate Judiciary Committee in 1976 demonstrate the intent of the Congress that enacted the Sherman Act in 1890.

2. Respondent seeks support for its position in the opinions of this Court. Our petition has discussed (pp. 9-10, 14-15) most of the cases upon which respondent relies. *American Tobacco Co.* v. *United States*, 328 U.S. 781, upon which respondent also relies (Br. in Opp. 10), is irrelevant. The Court did not discuss or approve the portion of the jury instruction reproduced by respondent; the Court had no reason to do so, because all attempt-to-monopolize questions had been resolved before the case reached this Court.

3. Respondent asserts that the fact that it did not succeed in monopolizing the LP gas business demonstrates that its conduct is not "socially undesirable" and should not be forbidden (Br. in Opp. 17-18). But the socially undesirable result is not only the completed monopolization but the anticompetitive steps, and the harm inflicted on competitors, on the path to monopolization.

Failure to restrain persons who have exhibited an unequivocal intent to achieve a forbidden goal, and who

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[1]The Committee conceivably may have concluded that judicial clarification of existing law would make new legislation unnecessary.

have taken a substantial step toward achievement of that goal, inevitably exposes society to the risk that such persons will succeed in the future. It also exposes society to the risk that their efforts will produce harmful results even if they never achieve that which they seek. *Swift & Co.* v. *United States*, 196 U.S. 375, recognizes that the basic purpose of all attempt offenses is to impose restraints upon such dangerous persons before they succeed. The Court declared that acts which are not sufficient in and of themselves to produce a forbidden result may constitute an attempt, if the acts are performed with a specific intent to achieve the forbidden goal. 196 U.S. at 396.

The court of appeals concluded that the evidence in this record clearly establishes that respondent acted with a specific intent to achieve monopoly. Respondent has not cited any evidence tending to refute that conclusion.

If the decision below is allowed to stand, coercive conduct of the type described in this record, which can serve only to diminish competition, will be immune from restraint until the conduct brings some market to the brink of monopolization. The court of appeals has held that the Sherman Act, described by this Court as "a comprehensive charter of economic liberty,"[2] which was intended to prohibit all substantial restraints upon competition,[3] does not prohibit conduct that makes a substantial step toward monopolization. This ruling seriously weakens the efficacy of the Act in accomplishing its objective.

The record in this case is clear: respondent undertook anticompetitive and coercive acts with the specific intent to monopolize. Respondent has not been able to

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[2]*Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4.

[3]*Standard Oil Co.* v. *United States*, 221 U.S. 1.

achieve its intended objective, but this fortuitous failure does not change the character of respondent's actions or make them any less dangerous.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.